110-330

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 222.

S. STAATS TAYLOR AND EDWARD PARSONS, TRUSTEES OF THE CAIRO CITY PROPERTY, PLAINTIFFS IN ERROR,

vs.

MARY N. MAYO, ADMINISTRATRIX, DEVISEE AND LEGATEE OF CHARLES DAVIS, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 12, 1881.

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United States Supreme Court.

MARY N. MAYO, Adm'x, *vs.* S. STAATS TAYLOR *et al.*

Writ of Error. Filed September 30th, 1880.

[a] UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Judges of the Circuit Court of the United States for the Southern District of Illinois, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between Mary N. Mayo, administratrix and devisee and legatee of Charles Davis, deceased, and S. Staats Taylor and Edward Parsons, trustees of the Cairo City property, a manifest error hath happened to the great damage of the said S. Staats Taylor and Edward Parsons, trustees, aforesaid, as by their complaint appears.

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said

[b] Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Springfield, in said district, this thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

J. A. JONES,
Clerk U. S. Cir. Court, South. Dist. Ills.

[c] *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Mary N. Mayo, administratrix and devisee and legatee of Charles Davis, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United

States for the southern district of Illinois, wherein S. Staats Taylor and Edwin Parsons, trustees of the Cairo City property, are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness S. H. Treat, district judge of said district, and one of the judges of said circuit court, this 30th day of September, A. D. 1880.

S. H. TREAT.

I herby accept service of the foregoing citation.

MARY N. MAYO,
By SAMUEL P. WHEELER,
Her Att'y.

1 Pleas in the circuit court of the United States of America, for the southern district of Illinois, held at the city of Springfield, in said district, before Hon. Samuel H. Treat, district judge of said district, and in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit, *pro tempore*, sole judge of said court, on Monday, the 2d day of August, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

J. A. JONES, *Clerk.*

MARY N. MAYO, Administratrix and Devisee and Legatee of Charles Davis, deceased,
vs.
S. STAATS TAYLOR and EDWIN PARSONS, Trustees of the Cairo City Property.
} In assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered that heretofore, to wit, on the 25th day of October, in the year of our Lord one thousand eight hundred and seventy-five, came the said defendant, Taylor, by his attorneys, and filed in the office of the clerk of said court his appearance and transcript of the record of said cause in the circuit court of Alexander county, Illinois, which appearance and transcript are in the words and figures following, to wit:

Appearance.

UNITED STATES OF AMERICA,
Southern District of Illinois. } ss:

In the Circuit Court of the United States in and for said District, of the January term, 1876.

MARY N. MAYO,
vs.
S. STAATS TAYLOR, Trustee of the Cairo City Property, } Assumpsit.

And now comes the said defendant, S. Staats Taylor, trustee of the Cairo City property, by Green & Gilbert, his attorneys, and files in the said circuit court of the United States the certified copy of the record of the State court, hereto attached,
3 marked "A," and enters his appearance in the above-entitled cause, to which said record appertains.

S. STAATS TAYLOR,
Trustee of the Cairo City Property.
By GREEN & GILBERT,
His Attorneys.

"A" Transcript.

UNITED STATES OF AMERICA.

In Circuit Court, September term, A. D. 1875.

STATE OF ILLINOIS,
Alexander County. } ss:

Pleas, before the Honorable David J. Baker, judge of the 26th judicial circuit of the State of Illinois, and sole presiding judge of the circuit court of Alexander county, in the State aforesaid, and at a term thereof begun and held at the court-house, in the city of Cairo, in said county, on the first Monday (being the sixth day) of September, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the ninety-nine.

Present: Honorable David J. Baker, judge of the 26th judicial circuit of the State of Illinois.

REUBEN S. YOCUM, *Clerk.*
WILLIAM C. MULKEY,
State's Attorney.
ALEXANDER H. IRWIN,
Sheriff.

Attest: REUBEN S. YOCUM, *Clerk.*

4 Be it remembered that heretofore, to wit, on the 16th day of August, A. D. 1875, a praecipe and cost bond was

filed in the office of clerk of circuit court in Alexander county, in the words and figures, following, to wit:

Praecipe and Bond for Costs.

In the circuit court of said county to the September term, A. D. 1875.

STATE OF ILLINOIS, } ss:
County of Alexander, }

MARY N. MAYO
vs.
S. STAATS TAYLOR AND EDWIN PARSONS, Trustees of Cairo City property. — Assumpsit. Damages, $20,000.

Will the clerk please issue summons in the above-styled cause returnable to the above term. The action is assumpsit, damages twenty thousand dollars ($20,000). Direct and deliver to the sheriff of Alexander county to execute, and oblige—

SAMUEL P. WHEELER,
Att'y for Plaintiff.

SAME *vs.* SAME.

I, Samuel P. Wheeler, do enter myself security for all costs which may accrue in the above cause, dated August 14th, 1875.

SAMUEL P. WHEELER.

5 And thereafter, to wit, on the day and year last aforesaid, there was issued out of said clerk's office a writ of summons, in the words and figures following, to wit:

Summons.

STATE OF ILLINOIS, } ss:
Alexander County, }

The people of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you summon S. Staats Taylor and Edwin Parsons, trustees of Cairo City property, if they shall be found in your county, personally to be and appear before the circuit court of said county, on the first day of the next term thereof, to be holden at the court-house in the city of Cairo, in said Alexander county, on the first Monday of September, A. D. 1875, to answer unto Mary N. Mayo, in her plea of assumpsit to her damage, as she says, of $20,000.00, filed in said court on the law side thereof. And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness Reuben S. Yocum, clerk of our said court, and the

seal thereof, at the city of Cairo, this (16th) sixteenth day of August, A. D. 1875.

[SEAL.] REUBEN S. YOCUM,
Clerk.

6 And thereafter, to wit, on the 27th day of August, A. D. 1875, said writ was returned in said clerk's office, with an endorsement thereon, in the words and figures following, to wit:

STATE OF ILLINOIS, }
Alexander County, } *ss:*

I have duly served the within by reading the same to the within-named S. Staats Taylor, August 27th, 1875; the other within-named defendant not found, as I am therein commanded.

ALEXANDER H. IRWIN,
Sheriff.

And thereafter, to wit, on the 27th day of August, A. D. 1875, the plaintiff filed her declaration in said clerk's office, in the words and figures following, to wit:

Declaration.

In the Circuit Court of said County, September Term, A. D. 1875.

STATE OF ILLINOIS, }
Alexander County, } *ss:*

Mary N. Mayo, formerly Mary N. Davis, the plaintiff in this suit, by Samuel P. Wheeler, her attorney, complains of S. Staats Taylor and Edwin Parsons, trustees of Cairo City property, defendants, of a plea of trespass on the case on promises.

7 For that whereas the said defendants as trustees as aforesaid, heretofore to wit, on the 4th day of October, 1861, at New York, in the State of New York, to wit, at the county and State aforesaid, executed and delivered to Charles Davis then in full life, but since deceased, their contract in writing of the date aforesaid, and thereby then and there in consideration that the said Charles Davis, late one of the trustees of the Cairo City property, had agreed to transfer to the defendant then the trustees of the said Cairo City property at their request all of said property remaining in his hands without requiring previous payment of his demands against said property, and for the other consideration of one dollar to them paid, did promise and agree to and with the said Charles Davis, his executors, administrators, or assigns, that they would apply from time to time, to the payment of all just claims and demands of said Charles Davis against said Cairo City property, including the sum of seven thousand three hundred and eighty-two and 60-100 dollars, audited October 1st, 1860, until the same should be fully paid, all the money which

should come and remain in their hands as trustees as aforesaid after first paying therefrom all taxes and current expenses of said property and trust actually imposed or incurred; and it was provided in and by said contract that the claims and demands of said Davis, his executors, or administrators should not be pre-
8 ferred to like claims of his late co-trustee John H. Wright.

And the plaintiff avers that there was then and there to wit, at the time of the execution and delivery of said contract due to the said Charles Davis of just claims and demands against said Cairo City property a large sum of money, to wit, seven thousand three hundred and eighty-two and 60-100 dollars audited and allowed as aforesaid, and the sum of to wit, ten thousand dollars not audited.

By means whereof the said defendants then and there became liable to pay to the said Charles Davis the said sum of seventeen thousand three hundred and eighty-two and 60-100 dollars, according to the tenor and effect of the said contract, and being so liable they then and there in consideration thereof undertook and promised the said Charles Davis in his lifetime to pay him the said last-mentioned sum of money according to the tenor and effect of the said contract.

And the plaintiff further avers that afterwards, to wit, on the 1st day of March, 1867, the said Charles Davis departed this life after having made, published, and declared his last will and testament, which said will was, on the 20th day of March, 1867, duly proven before the surrogate of the county of New York in the State of New York, and said will and the proofs were recorded in the
9 office of said surrogate, whereby the said Charles Davis did give, devise, bequeath all his estate, real and personal, of every nature, kind and description and wheresoever situate unto the said plaintiff, and thereupon afterwards, to wit, on the 30th day of September, 1867, at the city of New York, to wit, at the county and state aforesaid, the said defendants in consideration of the premises aforesaid, and in consideration of one dollar and of sundry other considerations from the said plaintiff to the said defendants moving, did execute and deliver to the plaintiff a contract in writing, bearing date the day and year last aforesaid, and did thereby then and there covenant and agree with the said plaintiff that the agreements made between the said defendants and the said Charles Davis, dated October 4th, 1861, relative to the payment by said defendants as trustees of the Cairo City property of the claims and demands of said Charles Davis against said Cairo City property was thereby renewed and confirmed, and the said defendants did thereby promise and agree to and with the plaintiff to pay to her the amounts due to said Charles Davis and his estate in the same manner and form as in said instrument of October 4, 1861, was particularly set forth.

And the plaintiff further avers that there, then and there, to

wit, on the day and year last aforesaid, at the county and State aforesaid, was due of the moneys theretofore just claims
10 and demands of the said Charles Davis against said Cairo City property, a large sum of money, to wit, seven thousand three hundred and eighty-two $\frac{60}{100}$ dollars (besides interest,) audited and allowed as aforesaid, and to wit, ten thousand dollars not audited. By means whereof the said defendants then and there became liable to pay to the plaintiff the said sums of money aforesaid, according to the tenor and effect of the said contract with the said Charles Davis, and being so liable, they the said defendants, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at the county and State aforesaid, undertook and then and there promised the plaintiff to pay her the said sums of money according to the tenor and effect of the said contract with the said Charles Davis. And the plaintiff further avers that the said defendants have not from time to time or in any manner whatsoever applied to the payment of said sums so due as aforesaid, all the moneys which have come to their hands as trustees, after first paying therefrom all taxes and current expenses of said property and trust actually imposed or incurred; but on the contrary thereof, although as the plaintiff avers, large sums, to wit, two hundred thousand dollars have come to their hands as such trustees over and above the amount necessary to pay all taxes and current expenses of said property and
11 trust, actually imposed or incurred, yet the defendants have not paid the said sums, in whole or in part, but refuse so to do.

2d. And for that, whereas the said defendants, as trustees, as aforesaid, heretofore, to wit, on the 4th day of October, 1861, at New York, in the State of New York, to wit, at the county and State aforesaid, executed and delivered to Charles Davis, then in full life, but since deceased, their other contract in writing, bearing date the day and year last aforesaid, and thereby then and there in consideration that the said Charles Davis, late one of the trustees of the Cairo City property, had agreed to transfer to the defendants, then the trustees of the Cairo City property, at their request, all of the said property remaining in his hands, without requiring previous payment of his demands against said property, and for the other considerations of one dollar to them paid, did promise and agree to and with the said Charles Davis, his executors, administrators, or assigns, that they would, within a reasonable time thereafter, pay to the said Charles Davis all just claims and demands, which he, the said Charles Davis, had against said Cairo City property, including the sum of seven thousand three hundred and eighty-two and $\frac{60}{100}$ dollars, audited October 1st, 1860. And the plaintiff avers there was then and there, at the execution and delivery of said contract due
12 the said Charles Davis, of just claims and demands against

the said Cairo City property, a large sum, to wit, the sum of seven thousand three hundred and eighty-two and $\frac{60}{100}$ dollars, audited October 1st, 1860, and a large sum, to wit, ten thousand, not audited. By means whereof the said defendants then and there became liable to pay to the said Charles Davis the said sums of money last aforesaid, within a reasonable time thereafter, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county and State aforesaid, undertook and then and there promised the said Charles Davis, then in full life, to pay him the said sums of money within a reasonable time thereafter.

And the plaintiff further avers, that afterwards, to wit, on the 1st day of March, 1867, the said Charles Davis departed this life, after having made, published, and declared his last will and testament, which said will was, on the 20th day of March, 1867, duly proven before the surrogate of the county of New York, in the State of New York, and said will and the proofs were duly recorded in the office of said surrogate, whereby the said Charles Davis did give, devise and bequeath all his estate, real and personal of every nature, kind, and description, and wheresoever situate unto the said plaintiff, and thereupon afterwards, to wit, on the 30th day of September, 1867, at the city of
13 New York, in the State of New York, to wit, at the county and State aforesaid, the said defendants executed and delivered to the plaintiff by the style of Mary N. Davis their contract in writing, bearing date the day and year aforesaid, and thereby then and there in consideration of the premises and of one dollar in hand paid by the plaintiff, and of sundry other considerations to said defendants moving, from said plaintiff, did renew and confirm the said contract between the said defendants and the said Charles Davis, dated October 4th, 1861, relative to the payment by the said defendants, as trustees of the Cairo City property, of the claims and demands of said Charles Davis against said Cairo City property, and the said defendants did thereby promise and agree to and with the said plaintiff, by the style aforesaid, to pay to her the amounts due to the said Charles Davis, in the same manner and form as in said instrument of October 4, 1861, is particularly set forth, to wit, within a reasonable time thereafter.

And the plaintiff further avers that there, then and there, to wit, on the day and year last aforesaid at the county and State aforesaid, there was due of just claims and demands, theretofore of the said Charles Davis against said Cairo City property a large sum of money, to wit, seven thousand three hundred and eighty-two and $\frac{60}{100}$ dollars (besides interest) audited and allowed as aforesaid, and to wit ten thousand dollars not audited; by means whereof the said defendants then and there became liable, and in consideration thereof then and there promised the said plaintiff

to pay her the said sums of money within a reasonable time
14 thereafter; but although a reasonable time has long since passed, the said defendants have not paid the said sums of money, or either of them, or any part thereof, but so to do have hitherto wholly neglected and refused, and still neglect and refuse.

3d. And for that whereas the said defendants as trustees as aforesaid, heretofore to wit, on the 4th day of October, 1861, at New York, in the State of New York, to wit, at the county and State aforesaid, executed and delivered to one Charles Davis then in full life, but since deceased, their certain other contract, in writing, which was and is in the words and figures following, that is to say—

"Whereas Charles Davis, late one of the trustees of the Cairo City property, has agreed to transfer to the present trustees of said property, S. Staats Taylor and Edwin Parsons at their request, all of said property remaining in his hands, without requiring previous payment of his demands against said property. Now, in consideration of the premises and of one dollar to us in hand paid, we, S. Staats Taylor and Edwin Parsons, trustees of the Cairo City property, hereby promise and agree to and with said Charles Davis, his executors, administrators, or assigns, that we will apply from time to time, to the payment of all the just claims and demands of said Charles Davis against said Cairo City property (including the sum of $7,382\frac{60}{100}$ dollars, audited October 1st, 1860,) until the same shall be fully paid, all the moneys which shall come and remain in our hands as trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and trust actually imposed
15 or incurred. But said claims and demands of said Davis, his executors, or administrators, shall not be preferred to like claims of his late co-trustee John H. Wright.

"October 4th, 1861.

"S. STAATS TAYLOR,
"EDWIN PARSONS,
"*Trustees of the Cairo City Property.*"

And the plaintiff avers, there was then and there, to wit, on the 4th day of October, 1861, at the county and State aforesaid, and at the said execution and delivery of said contract, due to the said Charles Davis of just claims and demands against the said Cairo City property, a large sum of money, to wit, the sum of seven thousand three hundred and eighty-two $\frac{60}{100}$ dollars, audited as aforesaid, and a large sum, to wit, ten thousand dollars, not audited. By means whereof the said defendants then and there became liable, and in consideration thereof then and there promised the said Charles Davis, then in full life, to pay him the said sums of money according to the tenor and effect of

the said contract. And the plaintiff further avers that afterwards, to wit, on the 1st day of March, 1867, the said Charles Davis departed this life, after having made, published, and declared his last will and testament, which said last will and testament was, on the 20th day of March, 1867, duly proven before the surrogate of the county of New York, in the State of New York, and said will and the proofs thereof were duly recorded in the office of said surrogate, whereby the said Charles Davis did give,
16 devise, and bequeath all his estate, real and personal, of every nature, kind and description, and wheresoever situate, unto the said plaintiff, and thereupon afterwards, to wit, on the 30th day September, 1867, at New York, in the State of New York, to wit, at the county and State aforesaid, the said defendants in consideration of the premises executed and delivered to her a contract in writing, which was and is in the words and figures following, that is to say:

NEW YORK, *September* 30, 1867.

In consideration of one dollar to us in hand, well and truly paid by Mary N. Davis, of said New York, administratrix of the the estate of Charles Davis, deceased, and of sundry other considerations to us moving, from said Mary N. Davis, it is hereby covenanted and agreed between us and the said Mary N. Davis that the agreement made between the undersigned and said Charles Davis, dated October 4, 1861, relative to the payment by us as trustee of the Cairo City property, of the claims and demands of said Charles Davis against said Cairo City property is hereby renewed and confirmed, and we do hereby promise and agree to and with said Mary N. Davis, administrator as aforesaid, to pay to her the amounts due to said Charles Davis and his estate, in the same manner and form as in said instrument of October 4, 1861, is particularly set forth dated September 30th, 1867.

S. STAATS TAYLOR, [SEAL.]
EDWIN PARSONS, [SEAL.]
Trustees of Cairo City Property.

And the plaintiff further avers *that* that there was at the date of the execution and delivery of the said contract due from
17 the said defendants of just claims and demands theretofore of the said Charles Davis against the said Cairo City property a large sum of money, to wit, the sum of seven thousand three hundred and eighty-two and $\frac{60}{100}$ dollars (besides interest) audited as aforesaid, and a large sum, to wit, ten thousand dollars, not audited; by means whereof the said defendants then and there became liable, and in consideration thereof then and there promised the said plaintiff to pay her the said several sums of money according to the tenor and effect of the said contract with the said Charles Davis. And the plaintiff further avers that the said defendants have not from time to time or in any man-

ner whatsoever applied to the payment of the said sums so due as aforesaid, all the moneys which have come to their hands as trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and trust actually imposed or incurred; but on the contrary thereof although the plaintiff avers large sums of money, to wit, two hundred thousand dollars have come to their hands as such trustees over and above the amounts necessary to pay all taxes and current expenses of said property and trust, actually imposed or incurred, yet the defendants have wholly refused to pay the said sums or any or either of them, or any part thereof, but so to do have hitherto wholly neglected and refused, and still do neglect and refuse.

4th. And for that whereas the said defendants heretofore, to wit, on the 1st day of August, 1875, at the county and State aforesaid, were indebted to the plaintiff in the sum of twenty thousand dollars for so much money by the said plaintiff
18 before that time lent and advanced to the said defendants at their request. And in the sum of twenty thousand dollars for so much money by the said defendants before that time had and received to and for the use of the plaintiff; and in the sum of twenty thousand dollars for so much money by the plaintiff before that time paid, laid out and expended to and for the use of the defendants at their request; and in the sum of twenty thousand dollars for so much money found to be due and owing from the said defendants to the said plaintiff on an account then and there stated between them; and in the sum of twenty thousand dollars for interest on divers sums of money before that time foreborne by the plaintiff to the defendants at their request for divers spaces of time before then elapsed, and being so indebted, the said defendants in consideration thereof, afterwards to wit, on the day and year aforesaid, at the county and State aforesaid, undertook and then and there promised the plaintiff to pay her the said several sums of money respectively on request, yet the defendants though often requested so to do have not paid the said several sums of money, or any or either of them, or any part thereof, but so to do have hitherto wholly neglected and refused, and still do neglect and refuse, to the plaintiffs damage twenty thousand dollars, wherefore she sues, &c.

SAMUEL P. WHEELER, *Att'y for Pl'ff.*

19 *Copy of Account Sued On.*

S. Staats Taylor & Edwin Parsons, trustees, etc.
To Mary N. Mayo, Dr.

To money lent and advanced	$20,000.00
To money had and received	20,000.00
To money paid, laid out, and expended	20,000.00
To money due on account stated	20,000.00
To money due for interest	20,000.00

Copies of Instruments Sued On.

"Whereas Charles Davis, late one of the trustees of the Cairo City property, has agreed to transfer to the present trustees of said property, S. Staats Taylor & Edwin Parsons, at their request, all of said property remaining in his hands without requiring previous payment of his demands against said property: Now in consideration of the premises, and of one dollar to us in hand paid, we, S. Staats Taylor and Edwin Parsons, trustees of the Cairo City property, hereby promise and agree to and with said Charles Davis, his executors, administrators, or assigns, that we will apply from time to time to the payment of all the just claims and demands of said Charles Davis against said Cairo City property, (including the sum of $7,382\frac{60}{100}$ dollars, audited October 1st, 1860,) until the same shall be fully paid, all the moneys which shall come and remain in our hands as trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and trust, actually imposed or incurred. But said claims and demands of said Davis, his executors or administrators, shall not be preferred to like claims of his late co-trustee, John H. Wright.

October 4th, 1861.

S. STAATS TAYLOR,
EDWIN PARSONS,
Trustees of the Cairo City Property.

NEW YORK, *September* 30, 1867.

In consideration of one dollar, to us in hand, well and truly paid by Mary N. Davis, of said New York, administratrix of the estate of Charles Davis, deceased, and of sundry other considerations to us moving from said Mary N. Davis, it is hereby covenanted and agreed between us and said Mary N. Davis, that the agreement made between the undersigned and said Charles Davis, dated October 4, 1861, relative to the payment by us, as trustees of the Cairo City property, of the claims and demands of said Charles Davis against said Cairo City property, is hereby renewed and confirmed, and we do hereby promise and agree to, and with, said Mary N. Davis, administrator as aforesaid, to pay to her the amounts due to said Charles Davis and his estate, in the same manner and form as in said instrument of October 4, 1861, is particularly set forth.

Dated September 30th, 1867.

S. STAATS TAYLOR, [SEAL.]
EDWIN PARSONS, [SEAL.]
Trustees of Cairo City Property.

And thereafter, to wit, on the 8th day of September, A. D. 1875, a motion was filed by the defendant Taylor, in the words and figures following, to wit:

21 *Motion to Quash Return on Summons.*

IN THE CIRCUIT COURT OF ALEXANDER COUNTY, *ss:*

S. STAATS TAYLOR, Trustee, &c., [impleaded with EDWIN PARSONS, Trustee, &c.,] *vs.* MARY N. MAYO. } Assumpsit.

Said defendant, S. Staats Taylor, trustee, &c., comes and moves the court to quash the return of the sheriff to the summons in the above cause, because the same is insufficient in law.

S. STAATS TAYLOR,
Trustee, Etc.
By GREEN & GILBERT,
His Attorneys.

And, to wit, on the 8th day of September, A. D. 1875, an order was made and entered of record in said cause, in the words and figures following:

Order overruling Motion to Quash.

MARY N. MAYO *vs.* S. STAATS TAYLOR AND EDWIN PARSONS, Trustees, &c. } Assumpsit.

On this day comes the plaintiff by Samuel P. Wheeler, Esq., her attorney, and also the defendant, S. Staats Taylor, by Messrs. Green & Gilbert, his attorneys. Thereupon the said defendant, Samuel Staats Taylor, enters his motion to continne this cause for want of service on his co-defendant Edwin Parsons, which motion is by the court and at the instance of plaintiff, after due consideration thereof, overruled, to which overruling the said defendant excepts; and thereupon the said defendant, Samuel Staats Taylor, enters his motion to continue this cause for want of service on his co-defendant Edwin Parsons, which motion is by the court and at the instance of plaintiff, after due consideration thereof, overruled, to which overruling the said defendant excepts; whereupon, on motion of plaintiff, said defendant Samuel Staats Taylor is ruled by the court to plead to plaintiff's
22 declaration herein by the meeting of the court on to-morrow morning.

And thereafter, to wit, on the 9th day of September, A. D. 1875, a demurrer was filed by the defendant Taylor, in the words and figures, following:

Demurrer.

In the Circuit Court.

STATE OF ILLINOIS, *Alexander County,* } *ss:*

S. STAATS TAYLOR, Trustee of the Cairo City Property, (impleaded, &c.,) *ats.* MARY N. MAYO. } Assumpsit.

Said defendant, S. Staats Taylor, trustee, &c., as aforesaid, impleaded, &c., and alone served with process, or appearing herein, now comes and defends the wrong and injury, &c., and says that the said declaration, and each count thereof, is insufficient in law. Wherefore, &c.

By GREEN & GILBERT,
His Att'ys.

"And thereafter, to wit, on the 9th day of September, A. D. 1875, a petition and bond for removal to the United States court, was filed by the defendant Taylor, in the words and figures following, to wit:

23 *Petition for Removal.*

In the Circuit Court of Alexander County.

STATE OF ILLINOIS, *Alexander County.* } *ss:*

MARY N. MAYO *vs.* S. STAATS TAYLOR, Trustee of the Cairo City Property, impleaded with EDWIN PARSONS, Trustees of the Cairo City Property. } Petition for Removal.

To the Hon. David J. Baker, Judge of the Circuit Court of Alexander county, Illinois:

Your petitioner, the above-named S. Staats Taylor, trustee of the Cairo City property, respectfully represents that the above cause is a suit of a civil nature at law, pending in said court, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and in which there is a controversy between, and wholly between, citizens of different States, to wit, the said plaintiff a citizen of the State of New York, and your petitioner, a citizen of the State of Missouri, and which can be fully determined as between them.

That the said plaintiff, Mary N. Mayo, commenced her said action on the 16th day of August, 1875, against your petitioner,

impleaded with Edwin Parsons, trustee of the Cairo City property, in assumpsit, to recover the sum of twenty thousand dollars, as appears by the declaration filed in said cause, and to
24 which reference is had, and which said sum is the amount in dispute exclusive of costs. That thereupon a summons was issued in said cause, returnable to the present term of said court now being holden, which term is the term of said court at which said cause could be first tried, but no trial thereof has yet been had.

That the said plaintiff was, when said suit was commenced, and still is, a citizen and resident of the State of New York.

That your petitioner was, when said suit was commenced, and still is, a citizen of the State of Missouri, having temporary business residence in the county of Alexander, State of Illinois.

That the said Edwin Parsons, trustee of the said Cairo City property, was when said suit was commenced, and ever since has been, and still is a citizen and resident of the State of New York.

That the said Edwin Parsons, trustee of the Cairo City property, has not been served with process or entered his appearance in said cause, nor is he now a party to said cause before said court; nor will he enter his appearance therein; nor can he be reached by the process of said court.

That on yesterday, the eighth day of September, 1875, your petitioner alone being served with process in said suit, and alone appearing therein, your petitioner moved said court for a continuance of said cause for want of service of process therein
25 upon said Parsons, trustee, &c., as aforesaid, but said plaintiff thereupon by her counsel urged her right under the statute, and thereby elected to prosecute said suit to final judgment against your petitioner alone, without service of process upon, or appearance of said Parsons, trustee, &c., as aforesaid, and thereupon said court overruled said motion for continuance, holding that said cause could be tried and fully determined as between your petitioner and said plaintiff, with service of process therein upon or the appearance of said Parsons, trustee as aforesaid; and now the said plaintiff, without service upon or appearance of said Parsons, trustee, &c., as aforesaid, and without any expectation thereof, is about to force a trial of said cause to a final determination against your petitioner, and will do so if said cause is further prosecuted at all; and said cause has become and is now a suit against your petitioner alone, or wherein your petitioner is the only real defendant, and the said Parsons, trustee, &c., aforesaid, at most but a nominal defendant, and in which there is not only a controversy between plaintiff and your petitioner, who are citizens of different States, but a controversy wholly between them, which can be fully determined between them, and in which no other controversy arises or can or will arise.

Wherefore your petitioner prays that said cause may be removed into the circuit court of the United States in and for the southern district of Illinois, there to be set for trial at the next term thereof; and your petitioner now makes and files
26 herewith a bond with good and sufficient security, as required by the act of Congress of March 3d, 1875, in such case made and provided and conditioned, &c., as therein specified.

S. STAATS TAYLOR,
Trustee of the Cairo City Property, Petitioner.

STATE OF ILLINOIS, } ss:
Alexander County, }

The above-named S. Staats Taylor, trustee of the Cairo City property, being duly sworn, upon his oath deposed and says that the matters and things stated in the foregoing petition, as therein stated, are true in substance and in fact, and further he says not.

S. STAATS TAYLOR.

Subscribed and sworn to before me, this 9th day of September, 1875.

REUBEN S. YOCUM,
Clerk.

Bond for Removal.

Know all men by these presents, that we, S. Staats Taylor, trustee of the Cairo City property, as principal, and William Stratton, as surety, are held and firmly bound unto Mary N. Mayo, her heirs, executors, administrators and assigns, in the sum of three thousand dollars; to which payment well and truly to be made are jointly, severally, and firmly bind ourselves, our heirs, executors, administrators, and successors in trust, by
27 these presents.

Sealed with our seals and dated the 9th day of September, A. D. 1875.

The condition of the above obligation is such that whereas the said Mary N. Mayo has instituted suit in the circuit court of Alexander county, State of Illinois, sitting in and for said county and State, against the above bounden S. Staats Taylor, trustee of the Cairo City property, impleaded with Edwin Parsons, trustee of the Cairo City property, to recover the sum of twenty thousand dollars, the said Edwin Parsons, trustee, etc., as aforesaid, not being served with process therein or appearing to said action; and whereas the said S. Staats Taylor, trustee of the Cairo City property, has filed a petition in said court for the removal of said cause to the circuit court of the United States in and for the southern district of Illinois.

Now, if the said S. Staats Taylor, trustee of the Cairo City property, shall enter in said circuit court of the United States in and for the southern district of Illinois, on the first day of its

next session, to be holden after the date hereof, a copy of the record in said suit, and shall also pay all costs that may be awarded by the said circuit court of the United States, if said circuit court of the United States shall hold that said suit was wrongfully or improperly removed thereto, and shall also there appear and enter his appearance in said suit, then the above obligation shall be void, otherwise to be in full force and effect.

S. STAATS TAYLOR, [SEAL.]
Trustee of the Cairo City Property.
WILLIAM STRATTON, [SEAL.]

28 STATE OF ILLINOIS, }
Alexander County, } *ss:*

I, the undersigned notary public in and for said county and State do hereby certify that on this day personally came before me, S. Staats Taylor, trustee of the Cairo City property, and William Stratton, who are personally known to me to be the same persons named in the above instrument, and whose names are subscribed thereto, and acknowledged that they signed, sealed, and delivered the said instrument, freely and voluntarily, for the uses and purposes therein mentioned.

Witness my hand and notarial seal, this 9th day of September, A. D. 1875.

[SEAL.] THOS. W. HALLIDAY,
Notary Public.

And to wit, on the 14th day of September, A. D. 1875, an order was made and entered of record in said cause in the words and figures, following:

Order for Removal.

MARY N. MAYO
vs.
S. STAATS TAYLOR AND EDWIN PARSONS, Trustees of the Cairo City Property.

On this day comes again the plaintiff by Samuel P. Wheeler, Esq., her attorney, and the defendant S. Staats Taylor, by Messrs. Green & Gilbert, his attorneys, and this cause coming on for
29 a hearing upon the said defendant Taylor's petition and bond filed herein for a transfer of this cause to the United States circuit court. The court after having examined and read said petition and bond allows said petition and approves said bond.

Therefore it is ordered by the court that this cause be transferred from this court to the United States circuit court for the southern district of the State of Illinois, and that the clerk of this court certify fo the said United States circuit court a transcript of the

heard the proofs and allegations, and the arguments of counsel, and being sufficiently advised in the premises, doth find the issue for the plaintiff, and assess her damages to the sum of twelve thousand nine hundred and fifty-seven $\frac{67}{100}$ dollars.

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendants the said sum of twelve thou-
33 sand nine hundred and fifty-seven dollars and sixty-seven cents, her damages aforesaid assessed, and her costs in this behalf expended, and that they have execution therefor.

And afterwards, to wit, on Friday the 6th day of October, at the term and in the year last aforesaid, the following further proceedings were had in said court and entered of record, to wit:

Order Allowing Writ of Error.

MARY N. MAYO, Adm'x, &c.,
vs.
S. STAATS TAYLOR *et al.*
} Assumpsit.

And now on this 6th day of August, 1880, on motion of the defendants, a writ of error to the Supreme Court of the United States is allowed them to operate as a supersedeas on their entering into bond to the plaintiff in the penalty of $16,000, conditioned as the law directs, with security to be approved by the court within 60 days from the 2d day of August, 1880.

And then afterwards, to wit, on the 30th day of September, in the year last aforesaid, came said defendants, by their at-
34 torneys, and filed in the said clerk's office their bond on writ of error in said cause, which is in the following words, to wit:

Bond on Writ of Error.

Supreme Court of the United States.

MARY N. MAYO
vs.
S. STAATS TAYLOR AND EDWIN PARSONS, Trustees of Cairo City Property.
} In Assumpsit.

Know all men by these presents, that we, S. Staats Taylor and Edwin Parsons, trustees aforesaid, as principals, and Thos. W. Halliday, as surety, are held and firmly bound unto said Mary N. Mayo in the penal sum of sixteen thousand dollars ($16,000), to the payment of which sum, well and truly to be made unto said Mary N. Mayo, her heirs, executors, and administrators, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of September, A. D. 1880.

Whereas at the June term, A. D. 1880, of the circuit
35 court of the United States for the southern district of Illinois, judgment was rendered in the above-entitled cause against said defendants, S. Staats Taylor and Edwin Parsons, trustees aforesaid, from which judgment said Taylor and Parsons have sued out a writ of error to said Supreme Court.

Now, therefore, the condition of this obligation is such that if the above-named S. Staats Taylor and Edwin Parsons, trustees, aforesaid, shall well and truly prosecute their said writ of error to effect, and shall well and truly pay or cause to be paid all costs incurred in said Supreme Court, if they shall fail to make good their plea, then this obligation to be null and void, otherwise to remain in full force and virtue.

S. STAATS TAYLOR. [SEAL.]
EDWIN PARSONS. [SEAL.]
THOS. W. HALLIDAY. [SEAL.]

Approved—
S. H. TREAT,
Dist. Judge.

36 I am satisfied with the surety on this bond, Thos. W. Halliday.

CAIRO, *Sept.* 28, 1880.

SAMUEL P. WHEELER,
Att'y for Mary N. Mayo.

(Endorsed): Filed Sept. 30, 1880. J. A. Jones clerk.

And now afterwards, to wit, on said 30th day of September, in the year last aforesaid, came said defendants, by their counsel, and filed in said clerk's office their bill of exceptions in said cause, which is in the following words, to wit:

Bill of Exceptions.

MARY N. MAYO, *vs.* S. STAATS TAYLOR and EDWIN PARSONS, Trustees, &c. } In the Circuit Court of U. S. for Southern District of Illinois, June Term, A. D., 1880.

Be it remembered that on the trial of this cause, which was before the court without intervention of a jury by consent, the court found from the evidence the following facts:

1st. That the said defendants in the life of Charles Da-
37 vis, to wit, Oct. 4th, 1861, executed and delivered to said Davis the following instrument:

Whereas Charles Davis, late one of the trustees of the Cairo City property, has agreed to transfer to the present trustees of said property, S. Staats Taylor and Edwin Parsons, at their re-

quest, all of said property remaining in his hands, without requiring previous payment of his demands against said property; now, in consideration of the premises and of one dollar to us in hand paid, we, S. Staats Taylor and Edwin Parsons, trustees of the Cairo City property, hereby promise and agree to and with said Charles Davis, his executors, administrators or assigns, that we will apply, from time to time, to the payment of all the just claims and demands of said Charles Davis against said Cairo City property, (including the sum of $7,382\frac{69}{100}$ dollars, audited October 1st, 1860,) until the same shall be fully paid, all the moneys which shall come and remain in our hands, as trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and trust, actually imposed or incurred. But said claims and demands of said Davis, his executors or administrators, shall not be preferred to like claims of his late co-trustee John H. Wright.

October 4th, 1861.

(Signed) S. STAATS TAYLOR,
(Signed) EDWIN PARSONS,
Trustees of the Cairo City Property.

2d. That said Charles Davis died about the month of November, A. D. 1866, and that the plaintiff was duly appointed and qualified as administratrix of his estate. That the said Charles Davis died testate, and that his will was duly proven and admitted to record on the 26th day of December, A. D. 1866, and that by said will the said plaintiff, Mary N. Mayo, then Mary N. Davis, was made sole devisee and legatee of the entire estate of which the said Charles Davis died seized or possessed.

3d. That defendants afterwards, to wit: September 30th, 1867, executed and delivered to plaintiff their instrument in writing, as follows:

38 NEW YORK *September* 30, 1867.

In consideration of one dollar to us in hand well and truly paid by Mary N. Davis, of said New York, administratrix of the estate of Charles Davis, deceased, and of sundry other considerations to us moving from said Mary N. Davis, it is hereby covenanted and agreed between us and said Mary N. Davis, that the agreement made between the undersigned and said Charles Davis, dated October 4, 1861, relative to the payment by us as trustees of the Cairo City property, of the claims and demands of said Charles Davis against said Cairo City property, is hereby renewed and confirmed, and we do hereby promise and agree, to and with said Mary N. Davis, administrator as aforesaid, to pay to her the amounts due to said Charles Davis and his estate, in the

same manner and form as in said instrument of October 4, 1861, is particularly set forth.

Dated September 30, 1867.

(Signed) S. STAATS TAYLOR. [SEAL.]
(Signed) EDWIN PARSONS. [SEAL.]
Trustees of Cairo City Property.

4th. That said Charles Davis had been, previous to his death and the execution of the first mentioned instrument, one of the trustees of the Cairo City property, acting under and by virtue of a declaration of trust, in the words and figures following:

39 To all people to whom these presens shall come, Thomas S. Taylor, of the city of Philadelphia, Esquire, and Charles Davis, of the city of New York, merchant, send greeting:

Whereas by several indentures heretofore executed, the following described tracts and parcels of land, all lying in townships numbered sixteen and seventeen, south of range one, west of the third principal meridian, at or near the confluence of the Ohio and Mississippi rivers, in the counties of Alexander and Pulaski, and State of Illinois, known as the Cairo City property, have been conveyed and assured to the said Thomas S. Taylor and Charles Davis, and to the survivor of them, and the heirs and assigns of such survivor, viz: The east half of the southeast quarter section four; the southeast fractional quarter of section five; the fractional section nine; the west half and northeast quarter of section ten; the west half and the east fractional half of section eleven; the fractional section fourteen; the south half and northwest quarter of fractional section fifteen; the fractional section twenty-two; the fractional section twenty-three; the fractional section twenty-four; the fractional section twenty-five; the fractional section twenty-six; the fractional section twenty seven; the fractional section thirty-five; the fractional section thirty-six; all lying in township number seventeen, in Alexander county, aforesaid; containing, together, three thousand nine hundred and eighty two acres more or less. [Excepting and reserving thereout the following described piece or parcel of land, conveyed by deed poll, bearing date the 27th day of August, 1838, executed by William Day, by his attorney in fact Ethan A. Hitchcock, to Elijah Willard, Commissioner of the Board of Public Works, for the use of the State of Illinois, for a railroad depot, to wit: Beginning at a certain point designated by a permanent and substantial stake marked O, on the bank of the Ohio river, and being the point at which the Central railroad line strikes the bank of the said river, being seven hundred and one feet due north of the line between the north half and south half of section twenty-five, and running from said point in a southwesterly direction along the bank of said river to a certain station designated by a

go to his personal representatives, and shall not descend as real estate.

Third. Transfers of said shares may be made by any shareholder, or by his agent or attorney duly authorized, in a transfer book or books, to be kept by the said Taylor and Davis, in the city of Philadelphia or New York, or both. No other transfer or assignment shall be valid. No transfer of shares shall be permitted, but upon a surrender of the certificate or certificates issued therefor, and no second duplicate certificate shall be issued, but upon such surrender, or proof of the loss or destruction of the original certificate.

Fourth. The said Taylor and Davis and their successors shall have the general management and control of all the property aforesaid, and of the proceeds thereof, pay the taxes thereon when in funds, and all the expenses incident to the creation and execution of the trust hereby declared. They may make such contracts, execute such instruments and obligations, employ such agents and laborers, make such erections and improvements on said lands, and such purchases and sales of real and personal estate, leases, donations and investments as may be necessary and expedient to promote the interests of the shareholders; but they shall not have power to bind the shareholders, either individually or collectively, to pay any debts or assessments on his or their shares, to perform any contracts for the payment of money, or for any other matter beyond the amount of funds which may come into the hands of the said Taylor and Davis.

They may from time to time declare and pay out dividends of profits and proceeds of sales to the several shareholders.

They shall exhibit annually to the shareholders at the city of Philadelphia, accounts showing in detail the situation of the property, and the amount of receipts and expenditures; and shall also exhibit a similar account whenever required by a majority in interest of the shareholders.

In making erections and improvements, leases, donations and investments, in the purchase and sale of property, and in laying out the plans of the same for a city, they shall receive such directions as may from time to time be given to them by three-fourths in interest of the shareholders; such directions, however, to be subject to the ratification and approval of the said Taylor and Davis.

They shall not be answerable for the acts, omissions, or defaults of each other, but only each for his own acts, omissions, or defaults.

They shall not be answerable for the misconduct, omission, or default of any agent or agents they may find it necessary to employ; but they shall be unaccountable only for the exercise of fair and reasonable skill and judgment, as well in

the appointment of such agent or agents, as in the general management of the trust hereby declared.

They shall receive such compensation for their services, as may from time to time be agreed upon by them and a majority in interest of the shareholders, and in case the said parties shall be unable to agree, then the said compensation shall be fixed by the judges of the court of common pleas of the city and county of Philadelphia.

Fifth. At any time after the expiration of *five years* from the date of these presents, the said Taylor and Davis, or either of them, may be removed, and a substitute or substitutes appointed by a vote of three-fourths in interest of the shareholders; or in case of the death or resignation of the said Taylor and Davis, or either of them, at any time, the said shareholders, by a similar vote, shall designate a successor or successors; and upon such removal, or upon the death or resignation of the said Taylor and Davis, or either of them, he or they shall, on request, execute and deliver such conveyances as may be necessary to transfer to the remaining trustee, and successor, or to the successors, so much of the said trust estate and property as shall remain in his or their hands, after payment of all expenses and liabilities.

Sixth. The said Taylor and Davis, or their successors, may hereafter increase the number of shares before mentioned, whenever they may be thereunto authorized in writing, by two-thirds in interest of the shareholders, for the time being; and may sell the additional shares so created either at public or private sale, the proceeds thereof to be expended in the improvement of the unsold portion of the property herein described, or hereafter to be acquired by the said trustees.

Seventh. No action of the shareholders shall be valid for any of the purposes aforesaid, unless the same shall take place at a meeting convened upon notice to all the shareholders, published in one or more newspapers in the city of Philadelphia, for four successive weeks; which notice shall be given by the said Taylor and Davis, or their successors, at any time when they may think proper, or whenever requested by the holder or holders of not less than one hundred shares—or at a meeting held in pursuance of an adjournment from a meeting convened upon such notice. But notice may be dispensed with, in case of any meeting of all the shareholders, or their duly authorized representatives.

Eighth. The said Taylor and Davis may, when requested by the president of the Illinois Exporting Company, issue and deliver to the order of said company certificates in the form hereto annexed, marked B, to the amount of forty thousand dollars, the trustees retaining in their hands certificates representing two thousand shares of the twenty thousand, to which the said company are entitled as aforesaid, with liberty to sell the shares so

retained, or any part thereof, at any time, and apply the proceeds towards the payment of the certificates aforesaid, marked B.

Witness the hands and seals of the said parties, this twenty-ninth day of September, in the year one thousand eight hundred and forty-six.

42

T. S. TAYLOR, [L. S.]
CH'S. DAVIS, [L. S.]
ILLINOIS EXPORTING CO., [L. S.]
By D. B. HOLBROOK, *President.* [L. S.]

J. ROBERTSON, [L. S.]
RICH'D H. BAYARD, [L. S.]
JAMES S. NEWBOLD, [L. S.]
HERMAN COPE, [L. S.]
T. S. TAYLOR, [L. S.]
Trustees of the Bank of the United States.

VINCENT EYRE, [L. S.]
THOMAS BARNWALL, [L. S.]
Assignee of Wright & Co.

JOHN HIBBERT, [L. S.]
HENRY WEBB, [L. S.]
MARTHA ALLINSON, [L. S.]
JAMES MACKILLOP, [L. S.]
TH'S LLOYD, [L. S.]
By their Att'y-in-fact, Ch's Davis.

Sealed and delivered in the presence of us.
JAMES S. FARMER.
JOHN RUMSEY.

STATE OF PENNSYLVANIA, }
Philadelphia County, } ss:

Be it remembered, that on the sixteenth day of October, A. D. eighteen hundred and forty-six, before me the subscriber, commissioner of the State of Illinois, in and for the said State of Pennsylvania, personally appeared Thomas S. Taylor, Charles Davis, Darius B. Holbrook, James Robertson, Richard H. Bayard, James S. Newbold, and Herman Cope, who are personally known to me to be the individuals described in and who executed the foregoing deed and severally acknowledged to me that they had executed the same; and the said D. B. Holbrook acknowledged that he executed the same as and for the act and deed of the Illinois Exporting Company, by signing his name as president, and affixing the common or corporate seal of said company to said deed, and the said James Robertson, Richard H. Bayard, James S. Newbold, Herman Cope, and Thomas S. Taylor, further acknowledged the execution of said deed as trustees of the bank of the United States, and the said Charles Davis further ac-

knowledged the said deed to be as well his act and deed, as the several and respective acts and deeds of Vincent Eyre, Thomas Barnwall, assignee of Wright & Co., John Hibbert, Henry Webb, Martha Allinson, James Mackillop, and Thomas Lloyd, his several and respective constituents.

Witness my hand and seal,

J. A. PHILLIPS, [L. S.]
Illinois Com'r.

44 That defendants, by regular and proper conveyances, were the successors of said Thomas S. Taylor and Charles Davis, as trustees, under similar declaration of trust, with the same powers and duties. Said Davis ceased to be trustee Sept. 29, 1860.

5th. That the principal object of the shareholders or co-owners of the lands mentioned in the said declaration of trust, as claimed by the trustees under said deeds, was to build a city on said lands.

The quantity of land was about nine thousand acres, situated at and near the point of confluence of the Ohio and Mississippi rivers, subject to inundation, and all except about fifty acres covered with dense timber.

While Charles Davis and Thomas S. Taylor were trustees the first levee to protect from inundation made by the old Cairo City and Canal Co. was swept away.

This was partially repaired, and afterwards, by direction of the shareholders, said trustees caused the erection of levees of sufficient size and height to protect the city to be commenced.

45 And among other things done by said Davis and Taylor, the old hotel was repaired; river bank protected from abrasion; roads were cut out through the timber; part of the land cleared; a new hotel built at an expense to the trust of about $20,000, and grounds were laid out for a cemetery; a steamboat was bought and run on the business of the trust; a quarry operated; also, a ferry; newspapers were established; the city and additions were platted; lots were donated as compensation to persons who assisted in protecting the property from adverse legislation; wharves were constructed and improved; all these expenses were paid out of the trust fund.

That the total receipts of the trust from the beginning were $1,411,391.66, exclusive of loans; that previous to Sept. 1, 1860, the amounts expended for improvements by Davis, Wright and Taylor, predecessors of the defendants, were $273,247.17. Since Sept. 1, 1860, up to 1874, on same account, by defendants were $298,286.91.

46 That taxes and assessments from the commencement of the old trust up to 1874, were $330,553.41; there were spent on the Ohio levee previous to Sept. 1, 1860, $61,607.99;

on same levee since Sept. 1, 1860, $122,897.65; on Mississippi evee since September 1, 1860, $149,973.23; on protection of Mississippi river bank, $70,455.06; for interest on loans, $43,036.78; and salaries and other expenses, making whole amount expended $1.411,490. Besides miscellaneous receipts, $125,000 were received from loans, which were also expended in the operations of the trust.

That the monthly balances of cash account of Charles Davis, Thomas S. Taylor, and J. H. Wright, the former trustees during the periods stated hereafter, were as follows, to wit:

47

D.

Condition of accounts of Thos. S. Taylor, and J. H. Wright, and Charles Davis, Trustees, as per Cash-Books, at dates specified.

No. and page of cash-book.	Date.	Due to trustees.	Cash in hands of trustees.	
No. 3, p. 25	1858, June 1	----------	$22,213 74	
28	July 1	----------	15,857 78	
31	Aug. 1	----------	18,127 17	
37	Sept. 1	----------	11,537 09	
40	Oct. 1	----------	10,470 39	
44	Nov. 1	----------	6,187 85	
47	Dec. 1	----------	2,318 01	
51	1859, Jan. 1	----------	2,383 36	
54	Feb. 1	----------	765 28	
58	Mar. 1	----------	1,110 72	
62	Ap'l 1	----------	3,624 24	
69	May 1	----------	7,372 56	
75	June 1	----------	2,277 37	
82	July 1	----------	4,215 96	
86	Aug. 1	----------	1,151 90	
90	Sept. 1	----------	1,937 94	
94	Oct. 1	----------	3,868 68	
97	Nov. 1	----------	4,479 10	
102	Dec. 1	----------	3,052 17	
106	1860, Jan. 1	----------	2,229 04	
111	Feb. 1	----------	2,778 93	
116	Mar. 1	----------	3,839 60	
121	Ap'l 1	----------	3,756 80	
127	May 1	----------	7,097 69	
131	June 1	----------	6,939 93	
146	July 1	----------	772 82	
154	Aug. 1	----------	2,497 88	
162	Sept. 1	----------	4,532 01	
167	" 30	----------	1,827 24	Transferred to S. S. Taylor and E. Parsons, trustees, &c.

48 That the monthly balances of cash accounts of defendants, as trustees, to the date of the first instrument herein mentioned, were as follows:

49 E.

Condition of Accounts of S. Staats Taylor and Edwin Parsons, Trustees, as per Cash-Books, at the dates specified.

No. and page of cash-book.	Date.	Due to trustees.	Cash in hands of trustees.
No. 3, p. 172	1860, Oct. 1	----------	$1,827 24
175	Nov. 1	$413 18	----------
181	Dec. 1	----------	2,187 85
186	1861, Jan. 1	----------	3,372 72
190	Feb. 1	----------	1,476 31
195	Mar. 1	----------	1,809 40
202	Ap'l 1	----------	4,390 41
209	May 1	----------	2,366 04
213	June 1	----------	1,620 38
217	July 1	----------	1,017 28
222	Aug. 1	412 62	----------
227	Sept. 1	----------	2,472 01
229	Oct. 1	20 50	----------

50 And since that date to commencement of this suit, Sept. 1, 1875, as follows:

51 F.

Condition of Accounts of S. Staats Taylor and Edwin Parsons, Trustees, at Dates Specified.

No. and page of cash-book.	Date.	Due to trustees.	Cash in hands of trustees.	
No. 3, p. 229	1861. Oct. 4	$20 50	----------	Date of obligation to Chas. Davis.
233	Nov. 1	1,310 91		
236	Dec. 1	1,426 76		
242	1862. Jan. 1	682 48		
247	Feb. 1	----------	$425 07	
253	Mar. 1	----------	2,655 63	
262	Ap'l 1	----------	6,914 51	Testimony, p. 46.
270	May 1	----------	6,936 73	
278	June 1	----------	6,310 75	$10,681.41 paid for taxes, cash-book No. 3, p. 282, 283, 284.
284	July 1	3,501 07	----------	Testimony, p. 30, 31.
292	Aug. 1	4,147 78		
297	Sept. 1	5,174 35		
301	Oct. 1	4,010 28		
306	Nov. 1	2,904 43		
310	Dec. 1	2,573 02	----------	$5,300 borrowed in New York, cash book 3, p. 315, 316, 323, 351, 390.
317	1863. Jan. 1	----------	1,413 42	Testimony, p. 8, 47 (error.)
322	Feb. 1	----------	3,712 83	
326	Mar. 1	----------	6,463 29	
332	Ap'l 1	----------	8,176 44	
339	May 1	----------	8,620 86	
344	June 1	----------	4,174 70	$10,704.34 paid for taxes, cash-book No. 3, p. 344, 350.
352	July 1	----------	4,869 60	
361	Aug. 1	----------	5,388 68	
370	Sept. 1	----------	6,400 70	
376	Oct. 1	----------	6,031 65	$75,000 borrowed.
383	Nov. 1	----------	8,050 93	$7,854 paid on loan of $5,300, cash book No. 3, p. 390.
393	Dec. 1	----------	14,770 07	Testimony p. 8, 26, 32, 33, 35.
401	1864. Jan. 1	----------	18,463 89	
408	Feb. 1	----------	20,576 58	
417	Mar. 1	----------	21,742 81	
427	Ap'l 1	----------	24,070 33	
52				
No. 3, p. 435	1864. May 1	----------	18,855 20	
443	June 1	----------	15,865 34	
457	July 1	----------	20,887 47	
480	Aug. 1	----------	14,852 95	Receipts for year $190,-236.49; expenditures for year $130,610.67, of it $17,039.40 taxes.

Condition of Accounts of S. Staats Taylor, &c.—Continued.

No. and page of cash-book.	Date.	Due to trustees.	Cash in hands of trustees.	
No. 4, p. 1	1864. Sept. 1	----------	$22,885 31	
11	Oct. 1	----------	25,685 32	Testimony, p. 35.
25	Nov. 1	----------	58,701 29	Mr. W. explain, p. 36, 37, 38.
39	Dec. 1	----------	34,750 55	
57	1865. Jan. 1	----------	31,988 34	Int. to N. Y. pt. of $12,517.50, 4, p. 62.
65	Feb. 1	----------	17,677 62	
75	Mar. 1	----------	11,057 25	
91	Ap'l 1	----------	31,016 10	
95	May 1	----------	32,625 04	
106	June 1	----------	26,594 74	
115	July 1	----------	12,979 00	
126	Aug. 1	----------	12,737 29	
137	Sept. 1	----------	6,995 63	Receipts $169,366.10; expenditures $213,217.54, of it $14,261.97 taxes.
144	Oct. 1	----------	10,119 87	$7,500 interest.
154	Nov. 1	----------	11,398 71	$19,952.39 borrowed on notes.
164	Dec 1	----------	2,020 91	Loan of $50,000, authorized.
174	1866. Jan. 1	----------	7,288 07	
183	Feb. 1	----------	6,650 32	
191	Mar. 1	----------	1,859 43	
203	Ap'l 1	----------	4,227 97	
209	May 1	----------	4,686 71	
217	June 1	----------	14,076 65	
226	July 1	----------	5,233 72	
232	Aug. 1	----------	8,464 45	
239	Sept. 1	----------	13,225 89	Receipts $157,267.19; expenditures $160,981.14, of it $26,719.90 taxes.
243	Oct. 1	----------	5,507 62	
249	Nov. 1	----------	13,722 64	
256	Dec. 1	----------	4,404 10	
264	1867. Jan. 1	----------	7,255 00	
267	Feb. 1	----------	7,831 38	
271	Mar. 1	----------	7,468 98	
53 278	1867. Ap'l 1	----------	7,353 41	
285	May 1	----------	10,691 32	
292	June 1	----------	16,326 96	
299	July 1	1,743 20		
305	Aug. 1	1,546 62		
311	Sep. 1	----------	1,971 39	Rec'pts, $77,482.94; expenditures, $88,589.38; of it $35,123.78 for taxes.
313	Sep. 30	2,233 64	----------	Date of obligation to Mrs. Davis.
315	Oct. 1	2,233 64		
323	Nov. 1	11,648 41		
329	Dec. 1	9,519 22		
335	1868. Jan. 1	8,315 61		

Condition of Accounts of S. Staats Taylor, &c.—Continued.

No. and page of cash-book.	Date.	Due to trustees.	Cash in hands of trustees.	
No. 4, p. 341	1868. Feb. 1	$6,580 09		
345	Mar. 1	4,850 32		
350	Ap'l 1	2,007 85		
354	May 1	1,036 80		
359	June 1	12,992 00		
364	July 1	13,162 63		
368	Aug. 1	12,370 35		
No. 5, p. 2	Sept. 1	13,984 42		
5	Oct. 1	13,733 21		
9	Nov. 1	16,423 18		
13	Dec. 1	15,024 07		
18	1869. Jan. 1	18,421 78		
22	Feb. 1	21,331 66		
26	Mar. 1	15,886 33		
30	Ap'l 1	13,340 37		
34	May 1	13,560 24		
36	June 1	27,090 71		
39	July 1	28,475 40		
41	Aug. 1	28,162 70		
45	Sept. 1	27,382 55		
48	Oct. 1	28,501 32		
51	Nov. 1	28,184 10		
54	Dec. 1	22,059 22		
58	1870. Jan. 1	18,773 32		
64	Feb. 1	17,283 19		
54 69	Mar. 1	16,190 54		
74	Ap'l 1	17,054 40		
79	May 1	24,339 93		
83	June 1	23,381 70		
87	July 1	25,892 91		
92	Aug. 1	25,117 93		
96	Sept. 1	24,334 31		
100	Oct. 1	23,672 10		
104	Nov. 1	22,498 80		
107	Dec. 1	21,977 75		
111	1871. Jan. 1	19,272 79		
115	Feb. 1	19,208 30		
119	Mar. 1	15,451 81		
123	Ap'l 1	13,115 26		
127	May 1	14,646 93		
132	June 1	28,440 99		
136	July 1	28,840 17		
140	Aug. 1	21,108 49		
143	" 31	----------	----------	$19,990 rec'd from Ills. Central R. R. Co., and a considerable portion used to pay existing indebtedness. (See Cash Book No. 5, p. 144.)
144	" 31	10,441 29		
145	Sept. 1	10,441 29		
148	Oct. 1	10,038 32		
153	Nov. 1	13,092 39		
158	Dec. 1	7,805 77		

Condition of Accounts of S. Staats Taylor, &c.—Cotinued.

No. and page of cash-book.	Date.	Due to trustees.	Cash in hands of trustees.	
No. 5, p. 163	1872. Jan. 1	$7,195 40		
168	Feb. 1	6,891 28		
171	Mar. 1	6,405 97		
175	Ap'l 1	4,174 70		
181	May 1	1,141 04		
185	June 1	4,373 00		
191	July 1	5,069 18		
196	Aug. 1	2,980 20		
200	Sept. 1	7,383 77		
203	Oct. 1	4,621 69	----------	Testimony, p. 42.
203	Oct. 4	----------	----------	$28,175 06 rec'd from Ills. C. R. R. Co. and sent to New York to pay on acc't of 3 years' accrued interest and overdue principal on bonds and other existing indebtedness. (See Cash Book No. 5, p. 203.)
55 204	Oct. 15	----------	----------	$27,414.53 rec'd from Ills. C. R. R. Co. and sent to New York to pay as above. (See Cash Book No. 5, p. 204.)
209	Nov. 1	4,112 96		
213	Dec. 1	3,223 17		
217	1873. Jan. 1	----------	$9,591 09	
221	Feb. 1	----------	11,074 40	
225	Mar. 1	----------	13,142 26	
230	Ap'l 1	----------	15,796 90	$16,975 83 paid for taxes. (See Cash Book No, 5, pp. 231, 232.)
234	May 1	----------	2,746 98	
239	June 1	----------	4,099 32	
245	July 1	----------	7,417 96	
250	Aug. 1	----------	5,165 23	
256	Sept. 1	----------	597 85	
260	Oct. 1	158 81		
264	Nov. 1	296 66		
268	Dec. 1	----------	513 50	
273	1874, Jan. 1	----------	1,791 76	
278	Feb. 1	----------	8,829 19	$5,000 rec'd from Ills. C. R. R. Co., Jan'y 20, 1874. (Cash Book No. 5, p. 275.)
282	Mar. 1	----------	10,331 72	
286	Ap'l 1	----------	11,385 91	$17,594.58 paid for taxes. (Cash Book No. 5, pp. 286, 287.)
290	May 1	6,097 33		
294	June 1	12,877 77		
298	July 1	7,696 52		
302	Aug. 1	8,089 31		

prior to January 1st, 1868, demanded of the defendants payment of the amount due on said contract, which was not paid.

Upon the foregoing facts, as found by the court, the court found the issues for the plaintiff, and rendered judgment for her against the said defendants for $12,957.67, to which the defendants then and there excepted.

In testimony whereof, the presiding judge of said court, presiding at the trial of this cause, doth sign and seal this certificate.

S. H. TREAT, [SEAL.]

(Endorsed): Filed Sept. 30, 1880. J. A. Jones, Clerk.

61 UNITED STATES OF AMERICA, *Southern District of Illinois, In Circuit Court,* } *ss:*

I, John A. Jones, clerk of said court, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause, wherein Mary N. Mayo, administratrix and devisee and legatee of Charles Davis, deceased, is plaintiff, and S. Staats Taylor and Edwin Parsons, trustees of the Cairo City property, are defendants, as fully as the same appear of file and of record in my said office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at Springfield, in said district, this 6th day of October, A. D. 1880.

[SEAL.] J. A. JONES, *Clerk.*

Endorsed on cover: S. Illinois, C. C. U. S. No. 222. S. Staats Taylor and Edward Parsons, trustees of the Cairo City property, plaintiffs in error, *vs.* Mary N. Mayo, administratrix and devisee and legatee of Charles Davis, deceased. Filed 12th February, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 222.

S. STAATS TAYLOR ET AL., PL'FFS IN ERROR,

vs.

MARY N. MAYO ET AL.

Stipulation of Counsel and Addition to Record.—Filed 10th December, 1883.

Supreme Court of the United States. October Term, 1883.

S. STAATS TAYLOR & EDWIN PARSONS, Trustees, &c., Pl'ffs in Error, *vs.* MARY N. MAYO, Adm'x, &c., Def't in Error. } No. 222.

In error to the Circuit Court of the United States for the Southern District of Illinois.

The printed record in this case fails to show the plea of defendants filed in the circuit court, and it is stipulated and agreed that a plea of nonassumpsit was filed in said circuit court by the defendants therein, on which issue was taken and trial had upon such issue. That the omission of said plea from the record is an error of the clerk, and the cause in the Supreme Court shall be heard as though said plea appeared in the record. The certified copy of the plea filed is attached hereto. Dec'r 5th, 1883.

SAMUEL P. WHEELER,
Att'y for Def't in Error.
WAGER SWAYNE,
Att'y for Pl'ff in Error.

UNITED STATES OF AMERICA, *Southern District of Illinois.* } *ss:*

Circuit Court U. S. for S'n District. Jan'y T., A. D. 1876.

S. STAATS TAYLOR & EDWIN PARSONS, Ad's, *vs.* MARY N. MAYO.

And said defendants, by Stuart, Edwards & Brown, his attorneys,

comes and defends the wrong and injury, when, &c., and says he did not undertake and promise in manner and form as the said pl'ff in her said declaration hath alleged, and of this he puts himself on the country.

STUART, EDWARDS & BROWN, *P. D.*

And the plaintiff doth the like.

SAMUEL P. WHEELER,
Att'y for Pl'ff.

Endorsed: Filed March 14, 1876. J. A. Jones, clerk.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois. }

In Circuit Court for said District.

I, John A. Jones, Clerk of the Circuit Court of the United States, within and for the Southern District of Illinois, do hereby certify that the foregoing is a true and correct copy of the plea of the defendants filed in said court on the 14th day of March, A. D. 1876, in a certain cause lately pending in said court, wherein *Mary N. Mayo, administratrix and devisee and legatee of Charles Davis, deceased,* was *plaintiff*, and *Samuel Staats Taylor and Edwin Parsons, trustees of the Cairo city property,* were *defendants*, which cause was removed to the Supreme Court of the United States upon a writ of error, as fully as the same appears of file in my said office; and I do further certify that upon the making up of the record in said cause for the Supreme Court of the United States said plea was by mistake omitted from the said record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Springfield, in said district, this 26th day of November, in the year of our Lord one thousand eight hundred and eighty-three and of the independence of the United States the one hundred and eighth year.

J. A. JONES,
[SEAL.] *Clerk United States Circuit Court for the Southern District of Illinois.*

110-330

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883. No. 222.

S. STAATS TAYLOR AND EDWIN PARSONS, TRUSTEES OF THE CAIRO CITY PROPERTY,

Plaintiffs in Error,

AGAINST

MARY N. MAYO, ADMINISTRATIX, DEVISEE AND LEGATEE OF CHARLES DAVIS, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR PLAINTIFFS IN ERROR.

WAGER SWAYNE,
Of Counsel.

C. G. Burgoyne, Law Printer, 57, 59 and 61 Park St., N. Y.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1883.

S. STAATS TAYLOR and EDW'D PARSONS,
Plaintiffs in Error,

AGAINST

MARY N. MAYO.

Brief for Plaintiffs in error.

Statement of the Case.

September 29, 1846, one Charles Davis was made one of two trustees under an Indenture of that date. These trustees were charged with building a city at Cairo, Illinois, upon lands belonging to the trust.

The principal object of the shareholders or co-owners of the lands mentioned in the said declaration of trust, as claimed by the trustees under said deeds, was to build a city on said lands. The quantity of land was about nine thousand acres, situated at and near the point of confluence of the Ohio and Mississippi rivers, subject to inundations and all but about fifty acres covered with dense timber.

The powers of the trustees are defined in the fourth clause of the Indenture.

"Fourth. The said Taylor and Davis and their successors shall have the general management and control of all the property aforesaid, and of the proceeds thereof, pay the taxes thereon when in funds, and all the expenses incident to the creation and execution of the trust hereby declared. They may make such contracts, execute such instru-

ments and obligations, employ such agents and laborers, make such erections and improvements on said lands, and such purchases and sales of real and personal estate, leases, donations and investments as may be necessary and expedient to promote the interests of the shareholders; but they shall not have power to bind the shareholders, either individually or collectively, to pay any debts or assesments on his or their shares, to perform any contracts for the payment of money, or for any other matter, beyond the amount of funds which may come into the hands of the said Taylor and Davis. They may, from time to time, declare and pay out dividends of profits and proceeds of sales to the several shareholders. * * * In making erections and improvements, leases, donations and investments, in the purchase and sale of property, and in laying out the plans of the same for a city, they shall receive such directions as may from time to time be given to them by three-fourths in interest of the shareholders; such directions, however, to be subject to the ratification and approval of the said Taylor and Davis. * * * They shall be accountable only for the exercise of fair and reasonable skill and judgment, as well in the appointment of such agent or agents, as in the general management of the trust hereby declared."

Record, page 26, fol. 41.

These powers were exercised by Davis and his cotrustees for fifteen years. In their practical construction of the clause above cited they caused

"The erection of levees of sufficient size and height to protect the city to be commenced; the old hotel was repaired; river bank protected from abrasion; roads were cut through the timber; part of the land cleared; a new hotel built at an expense to the trust of about twenty thousand dollars, and grounds were laid out for a cemetery; a steamboat was bought and run on the business of the trust; a quarry operated; also, a ferry; newspapers were established; the city and additions were platted; lots were donated as compensation to persons who assisted in protecting the property from adverse legislation; wharves were constructed and improved; all these expenses were paid out of the trust fund."

Record, page 29, fol. 45.

October 4, 1861, the plaintiffs in error were by regular and proper conveyances the successors of said Thomas S. Taylor and Charles Davis as trustees.

The fourth clause of the trust deed gives to the trustees power "to execute such instruments and "obligations * * * as may be necessary and expedi- "ent to promote the interests of the shareholders," but without power to bind them beyond the extent of the trust fund.

Under this power, and to obtain from Davis a transfer of the trust estate which he agreed to make to them on condition, Parsons and Taylor, as trustees, executed the following agreement:

"Whereas, Charles Davis, late of the trustees of the Cairo City property, has agreed to transfer to the present trustees of said property, S. Staats Taylor and Edwin Parsons at their request, all of said property remaining in his hands, without requiring previous payment of his demands against said property. Now, in consideration of the premises and of one dollar to us in hand paid, we, S. Staats Taylor and Edwin Parsons, trustees of the Cairo City property, hereby promise and agree to and with said Charles Davis, his executors, adminisitrators, or assigns, that we will apply from time to time, to the payment of all the just claims and demands of said Charles Davis against said Cairo City property, including the sum of $7,382.60, audited October 1st, 1860, until the same shall be fully paid, all the moneys which shall come and remain in our hands as trustees as aforesaid, *after first paying therefrom all taxes and current expenses of said property and trust* actually imposed or incurred. But said claims and demands of said Davis, his executors or administrators, shall not be preferred to like claims of his late co-trustee John H. Wright.

October 4th, 1861.

"S. STAATS TAYLOR,
"EDWIN PARSONS,
"Trustees of the Cairo City Property."

Record, page 21, folio 37.

This agreement in its turn received a practical interpretation from all parties concerned. For five years, from the date of its execution to the death of the payee in November, 1866, the "current expenses of the property and trust" went on precisely as under the previous administration of the same trust by the payee. The record discloses that "previous to September 1, 1860, the amounts ex- "pended for improvements by Davis, Wright & "Taylor, predecessors of defendants' were $273,- "247.17. Since September 1, 1860, up to 1874, on "same account, by defendants, were $298,286.91."

Record, p. 29, fol. 45.

That taxes and assessments from the commencement of the old trust up to 1874 were $330,553.41; there were spent on the Ohio Levee previous to September 1, 1860, $61,607.99; on same Levee since September 1, 1860, $122,847.65; on Mississippi Levee since September 1, 1860, $149,973.23; on protection of Mississippi River bank, $70,455.06; for interest on loans, $43,036.78; and salaries and other expenses, making whole amount expended, $1,411,490. Besides miscellaneous receipts, $125,000 were received from loans, which were also expended in the operations of the trust.

During all these years no dividends were ever paid to the shareholders. On the contrary, the expenses continuously required more than the receipts and the administration ended in the insolvency of the concern. The Court found on this head:

"That to carry out the purposes and objects of the trust, the defendants at different times borrowed large sums of money and executed mortgages on all the real estate of the trust to secure the same, that is to say, October 1, 1863, the first mortgage was executed to secure nominally two hundred thou-

sand dollars, of which, however, only seventy-five thousand dollars were received; and the second mortgage was executed October 1, 1867, to secure fifty thousand dollars, most of which had been advanced by the lender before the date of the mortgage, the first sum bearing ten per cent. interest, and the latter seven per cent. interest.

"These mortgages were afterwards foreclosed for the sum of $97,680.57, which is still in part unpaid. The property sold, and the amount realized from the sale was insufficient to pay the amount due by $47,572.27.

"That the borrowing of said sums of money, and the execution of said mortgages are legitimate acts by said defendants in the execution of said trust."

Record, p. 36, fol. 56.

Meantime, September 30, 1867, which was before the insolvency of the trust, but after the death in November, 1866, of Davis, the payee above mentioned, the obligation was again renewed, I presume, to avoid the effect of the Illinois Statute of Limitations. The renewal was as follows:

"NEW YORK, September 30, 1867.

"In consideration of one dollar to us in hand well and truly paid by Mary N. Davis, of said New York, administratrix of the estate of Charles Davis, deceased, and of sundry other considerations to us moving from said Mary N. Davis, it is hereby covenanted and agreed between us and said Mary N. Davis that the agreement made between the undersigned and said Charles Davis, dated October 4, 1861, relative to the payment by us as trustees of the Cairo City property, of the claims and demands of said Charles Davis against said Cairo City property, is hereby renewed and confirmed, and we do hereby promise and agree to and with said Mary N. Davis, administratrix as aforesaid, to pay to her the amounts due to said Charles Davis and his estate, in the same manner and form as in said instrument of October 4, 1861, is particularly set forth.

"Dated September 30, 1867.

"(Signed) S. STAATS TAYLOR, [SEAL.]

"(Signed) EDWIN PARSONS, [SEAL.]

"Trustees of Cairo City Property."

In August, 1875, the year following the insolvency of the trust, the defendant in error, payee of this second obligation, brought suit on it in *assumpsit* in the Circuit Court of Alexander County, Illinois. The præcipe, summons and declaration all describe the defendants expressly as trustees, and as trustees only. (Record, pp. 4 and 5.)

A demurrer was filed for insufficiency in law, and the case was thereupon removed to the Circuit Court of the United States for the Southern District of Illinois. The demurrer was overruled and the defendants then filed a plea of *non assumpsit*. Both parties united in a writtten stipulation waiving a jury, and the cause was thereupon tried by the Court under sections 649 and 700, Revised Statutes U. S. The Court found the facts above stated and also the following:

"That during the trusteeship of the defendants they have faithfully applied all the sums of money received by them to the purposes of the trust, and according to their judgment in discharging what, in their opinion, were the current expenses of the trust, and in the exercise of a fair and reasonable judgment therein. That at the time of the execution of the last note to the plaintiff, and of the commencement of this suit, they had no money in their hands or under their control unexpended, but the trust fund was indebted to them in a large amount, to wit, $8,338.30.

"That the expenditures of money made by defendants were similar to and of the same general character as those made by Davis, Taylor, and Wright.

"That about the winter of 1863 and spring of 1864 the defendants, as trustees, erected, at a cost of about $35,000, an office for the keeping of the papers and transacting the business of the trust. That previous to and at the time of the commencement of said building, the office of the trustees had been a small frame building in the centre of the town, surrounded by frame buildings. That the sales of the

trust property at that time were nearly $200,000 yearly. That in the office was valuable property of the trust, including maps and plats of the city and additions, costing thousands of dollars, the surveys and reports of engineers, title papers of the trust, and other property, exposed to destruction by fire, and the building liable to injury or destruction by inundation and by earthquake. That in the opinion and best judgment of the trustees, a new, substantial fire-proof and earthquake-proof building, and one secure from the water, was necessary. That after the commencement of the work the cost of material and building increased. That the trustees deemed the erection of such a building in the place proper, and for the best interests generally of the trust; but the Court is of opinion that said expenditure was not the current expenses of said trust.

Record, folio 58.

"That the defendants on divers days and dates, in the years 1863, 1864, 1865, 1866, 1873, and 1874, had in their hands moneys belonging to said trust fund sufficient to pay the amount due the plaintiff, after paying therefrom all taxes on the said trust property, and the ordinary expenses of said trust, as appears from the accounts herein contained; and that the plaintiff on divers occasions prior to the bringing of this suit, and prior to January 1st, 1868, demanded of the defendants payment of the amount due on said contract, which was not paid. Upon the foregoing facts, as found by the Court, the Court found the issues for the plaintiff, and rendered judgment for her against the said defendants for $12,957.67, to which the defendants then and there excepted.

Record, folio 60.

"That after the sale of the trust estate, under the foreclosure proceeding aforesaid, a new trust was declared respecting the same property, and the said defendants became the trustees, the stockholders being a portion of the old stockholders who paid up their assessments; and the said defendants, after the commencement of this suit, by advice of counsel, retained in their possession sufficient funds belonging to the old trust, to pay the amount of plaintiff's claim, so as to protect them from the possibility of a personal judgment. That said money came into

their hands after the commencement of this suit."
Record, folio 59.

The Court thereupon rendered judgment in form following:

It is therefore ordered and adjudged by the Court that the plaintiff *recover of the defendants* the said sum of twelve thousand nine hundred and fifty-seven dollars and sixty-seven cents, her damages aforesaid assessed, and her costs in this behalf expended, and that she have execution therefor.
Record, folio 33.

Defendants thereupon sued out a writ of error, and made themselves personally answerable upon a *supersedeas* bond.

ASSIGNMENTS OF ERROR.

I. The Court erred in assuming jurisdiction to hear this complaint in an action at law. Equity had exclusive jurisdiction.

II. The Court erred in rendering judgment against the defendants in their individual capacity. The pleadings afford no basis for any judgment, except one against the defendants as trustees; in other words, against the trust estate.

III. The facts found are incompatible with a judgment for the plaintiff against anyone. The Court erred in rendering such a judgment.

IV. The finding of a subsequent indemnity is erroneous, because unsup-

ported by the pleadings, irrelevant and misleading.

I. THE COURT ERRED IN ASSUMING JURISDICTION TO HEAR THIS COMPLAINT IN AN ACTION AT LAW. EQUITY HAD EXCLUSIVE JURISDICTION.

Concerning the jurisdiction in equity in such a case, it is said by Mr. Justice STORY, in *Duval vs. Craig, 2 Wheaton, 22,* that

AT LAW, A JUDGMENT AGAINST A TRUSTEE, IN THAT SPECIAL CAPACITY, IS UTTERLY UNKNOWN.

A brief examination will disclose that *the instruments sued on create between the parties to them as such the relation of cestui que trust and trustees,* quite independent of the questions whether the agreements were entered into by the defendants as individuals, or only in a representative capacity as trustees of the Cairo City property.

A trustee may be sued at law for a conceded balance, for an amount which has been found against him, or for a definite balance remaining in hand after a trust has been completely executed, but under no other conditions.

"In the judgment of the Court of Exchequer, afterwards delivered by Rolfe, B., and concurred in, it may be inferred, by Pollock, C. B., and Parke, B., the principle is laid down as follows: that so long as no other relation subsists between two parties, except that of trustee and *cestui que trust,* no action can be maintained by the latter against the former for any money in his hands. The trustee is, in such case, the only person entitled at law to the money, and the remedy of the *cestui que trust* is exclusively in a Court of Equity. When indeed there is no trust to execute except that of paying over money to the *cestui que trust,* the trustee, by his conduct, as for instance by admission that he has money to be paid over, or by settling accounts, on that footing may and often does make himself

liable to an action at law at the suit of the *cestui que trust*, for money had and received, or for money due on account stated. Such was the case of Roper vs. Holland, 3 Adol. & El., 99, and there are many others to the same effect. But so long as there is no liability except as trustee, the *cestui que trust* has no legal remedy. A contrary doctrine might often deprive the trustee of many grounds of defense which would be available to him in equity; equitable set-off, for instance, or other equitable claims against the *cestui que trust*, which in good conscience ought to be available to him, and would be so in a Court of Equity, but which would afford no legal defense." Pardee vs. Price, 16 M. & W., 458. This well considered judgment has been approved by the Court of Queen's Bench. Edwards vs. Lowndes, 1 El. & Black, 89, 72 Eng. Com. Law Rep., 89.

2 Robinson's Practice, pp. 452, 454.

None of these situations is averred in the declaration. The sole averment is that

The defendants having received large sums, to wit: Two hundred thousand dollars * * * over and above the amount necessary to pay all taxes and current expenses of said property and trust, actually imposed or incurred, yet the defendants have not paid the said sums in whole or in part, but refuse so to do.

The plea of *non assumpsit* is the equivalent of a general denial. It thus made an issue which directly involved a review of the accounts of the defendants. If the agreement creates a trust relation, and is not a simple contract, then this review could only be had in a court competent to administer a trust and deal with the defendants as trustees.

"The inefficiency of the common action of assumpsit is too evident to require explanation; for in such an action the jury must investigate the account item by item, so as to return the verdict for the ultimate balance. And the practical impossibility of their doing so, generally results in a reference to arbitration."

Adams Equity, § 224.

On every ground, therefore there was no jurisdiction to hear this complaint in the shape in which it was presented, and it was erroneous to do so.

The significance of this inquiry into the jurisdiction is shown by the fact that the court rendered judgment against the defendants, while at the same time it did not hesitate to find that

> During the trusteeship of the defendants they have faithfully applied all the sums of money received by them to the purposes of the trust according to their judgment in discharging what in their opinion were the current expenses of the trust and in the exercise of a fair and reasonable judgment therein. (*Record, folio 57*).

This finding was a complete defense in equity, for not only is it true that "if the trustees exercised their discretionary power in good faith and without fraud or collusion the Court cannot review or control their discretion" (*Perry on Trusts*, § *511*), but it is also true that

> The trustee is entitled to be allowed as against the estate and the beneficiary all payments expressly authorized by the instruments of trust, all reasonable expenses in carrying out the directions of the trust, and in the absence of such directions all expenses reasonably necessary for security, protection and preservation of the trust property or for the prevention of a failure of the trust.
>
> *Pomeroy's Equity, Section 1058.*

> "And also, if they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect but probable."
>
> *Bright vs. North, 2 Phillips, 216, 220, per Lord Cottenham.*

The Circuit Court, upon the other hand, having taken jurisdiction at law no doubt felt controlled by the rule which governs proceedings at law, as ex-

pressed by this Court in *Watkins vs. Holman et al.*, 16 Peters, 59,

It is not perceived why a Court of law should regard a resulting trust more than other equitable rights; and any attempt to give effect to these rights at law, through the instrumentality of a jury, must lead to confusion and uncertainty. Equitable and legal jurisdictions have been wisely separated; and the soundest maxims of jurisprudence require each to be exercised in its appropriate sphere.

It therefore becomes of the utmost consequence to defendants that it shall be fairly determined whether their agreement with plaintiffs testator created a relation of trust or not. The Court below not only held that it did not create a trust, but held also that it was so far peremptory as even to cut off all right to any equitable defense. This was error, even in dealing with it as the proper subject-matter of an action of *assumpsit*.

For this action of *assumpsit* for money had and received was said by Lord MANSFIELD in the case of Moses vs. McFarlane, 2 Burrow, 1012, to be an equitable action in which the plaintiff could recover from the defendant so much money as he could show the defendant, *ex equo et bono*, ought not to retain.

Watson vs. Woolverton, 41 Illinois, 244.

When it comes to dealing with a trust, this right to equitable defenses is not merely present. It becomes also peremptory, and so wholly exclusive, that as was said above by Mr. Justice STORY, "at law, a "judgment against a trustee, in that special capac- "ity, is utterly unknown."

A trustee is one holding a trust.

A trust is said to be:

"An obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence. Willis on Trusts, 2. No particular form of words is necessa-

ry to constitute a trust, but if it be the plain intention of the parties to create a trust, it will be regarded as such."

Commissioners vs. Walters, 6 Howard (Miss.) 143.

This is an apt expression of the general doctrine. The proper inquiry is therefore whether that stipulation, an alleged breach of which is the basis of the suit, is such as to express the plain intention of the parties to repose in the defendants a confidence to apply the property faithfully and according to such confidence.

The stipulation is as has been shown:

"We will apply from time to time to the payment, &c., until the same shall be fully paid, all the moneys which shall come into our hands as trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and trust actually imposed and incurred." *Record folio 37.*

Plaintiff's testator was a retiring trustee of what was known as the Cairo City property. He had acted as such trustee for fifteen years. Defendants were his successors in the trust.

It is plain that by "current expenses of the property and trust" the parties had reference to that trust in which they were all concerned, and to which express reference is made in the body of the instrument as well as in their signatures. The terms of this trust are defined in the trust deed. This is embodied in the record, and is part of the bill of exceptions. *Record folio 23, 28.*

By the term "current expenses," used in the agreement sued on, the parties to it must either have meant those expenses which by the terms of the deed were required by the current operations of

the trust, or else they must have meant that the current operations of the trust should stop, if need be, until plaintiff's testator had been paid.

The signers of the agreement cannot have meant the last, because whether in contemplation of law they signed that agreement individually or as trustees of the Cairo City property, in either case such agreement would have been contrary to the express requirements of the original trust under which they were then acting and for which they were accountable.

That nobody so understood it is made equally plain by the course pursued by plaintiff's testator. He was defendants' predecessor, thoroughly familiar with the operations of the trust. He lived five years after the execution of the original agreement, and died in November, 1866.

During all this time not only were the operations of the trust continued and current expenses incurred of the same character which he himself had previously incurred (*Record, fol. 57*), his own debt remaining all the while unpaid, but no complaint or demand was ever made by him.

The renewed agreement with plaintiff direct was made September 1st, 1867. It is found by the Court that in the year 1878, and on some prior occasions, the demand was made by *plaintiff* for the payment of this debt; but there is no showing whatever of demand being ever made by Davis, the original trustee.

In Chicago vs. Sheldon, 9 Wall., 54, Mr. Justice NELSON says:

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical inter-

pretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

The trust deed is explicit on the subject of current expenses, not only in prescribing what it may include, but also in defining the liability of the trustees therefor. It expressly provides:

"They shall not be answerable for the misconduct, omission, or default of any agent or agents they may find it necessary to employ; but they shall be accountable only for the exercise of fair and reasonable skill and judgment, as well in the appointment of such agent or agents as in the general management of the trust hereby declared."

Record, folio 42.

Hence the two contrasted propositions are these:

1. On the one hand that the agreement sued on was made by the parties in view of their existing situation; that by current expenses of the trust they meant the expenses incident to the current operations of the trust to which they referred, and that such were to be incurred by the defendants simply in the discharge of their duty as trustees under the deed, and with the powers and liabilities prescribed by that deed, and not otherwise. In that case it plainly follows that plaintiff's testator agreed and became party to the confidence or trust, which by the trust deed is reposed in the trustees. This creates a special trust relation, making plaintiff's testator simply a preferred beneficiary of the original trust.

2. On the other hand, that without apparent motive

or any increase of benefit resulting to themselves, the defendants contracted with plaintiff's testator that if necessary to the immediate payment of his debt they would arrest the operations of the trust, and, as between themselves and him, set aside the usual limit of the liability of the trustee or agent, peremptorily enjoyed by them under the trust deed; and agreed that all the vast expenses which the care of such a property required should be at their own peril, and be subject to a judicial review, in which an equitable defense should be of no avail; and should be tested by that wisdom which comes after the fact.

The latter proposition is the one adopted by the court.

Whether tested by the facts or by the law applicable, it is believed to be erroneous.

II. THE COURT ERRED IN REDERING JUDGMENT AGAINST THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITY. THE PLEADINGS AFFORD NO BASIS FOR ANY JUDGMENT EXCEPT AGAINST THE DEFENDANTS AS TRUSTEES; IN OTHER WORDS, AGAINST THE TRUST ESTATE.

This suit, it will be observed, is entitled as against the defendants "Trustees of the Cairo City Prop-"erty." It commenced with a præcipe for summons "in the above-styled cause." The command of the writ is "that you summon S. Staats Taylor and "Edwin Parsons, Trustees of the Cairo City Prop-"erty," &c. The declaration recites that plaintiff "complains of S. Staats Taylor and Edwin Par-"sons, *trustees of Cairo City property*, defendants, "* * * for that whereas the said defendants, *as*

"*trustees as aforesaid,* * * * executed and de-
"livered to Charles Davis," &c.

Here is plainly no issue to support a judgment against the defendants personally. They are complained of expressly in their character of trustees, and upon an instrument which it is expressly claimed they executed in that capacity.

"It is a rule in chancery, not affected by the Code of Procedure, that a party must recover according to the case made by his complaint, or not at all; '*secundum allegata*,' as well as '*probata*.' No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings and evidence."

Rome Exchange Bank vs. Eames, 4 Abb. Ct. App. Dec., 83, 87.

"No rule is better settled than that the decree must conform to the allegations as well as the proofs in the cause."

Crockett vs. Lee, 7 Wheat., 522, 525.

The frame of the agreement is not such that it can be said that those words which express the representative character in which it is made are merely *descriptio personorum*. It was nevertheless possible for plaintiff to have taken this ground and to have sued the defendant personally. In that case the question as to whether the agreement or signatures were so worded as to bind the defendants personally would have been before the Court. Plaintiff, however, to do this must have foregone her action against the defendants as trustees. She could not sue the defendants in both capacities at once. She elected to sue the defendants as trustees. The Court rendered a judgment against the defendants personally. This is manifestly erroneous.

It cannot be said in reply that while the suit is

against the defendants as trustees, and is upon an agreement which they executed as trustees, nevertheless the breach averred is one for which the defendants are personally liable to plaintiff. The allegations are as far from supporting any such position as the title. If it were charged that defendants had taken *for themselves* moneys which the plaintiff was entitled to, that might support an action, properly entitled, against them as individuals; if it were claimed that through faulty administration the estate was wasted to plaintiff's loss, her action might then, if properly entitled, lie against the defendants personally.

Either would be an action *ex-delicto*, which this is not, and would not be an action *ex-contractu*, which this is. In other words, a personal judgment might properly go against the defendants for a fault which was their own, although committed in the course of their administration as trustees. A personal judgment, however, is plainly erroneous "in an action " of trespass on the case on promises " which it is expressly averred have been made by the defendants as trustees. The substance of the declaration is that the defendants, having promised as trustees to pay to plaintiff, whenever received, certain proceeds of the trust, and having afterwards received them have failed to pay them over, whereupon the plaintiff sues upon the broken promise. The promise having been made by the plaintiffs as trustees, was simply a promise that the trust would pay. Had a change of trustees occurred the promise would have survived as a charge upon the trust. Upon a breach, the trust was liable in damages. The trustees might also be liable if the breach was from their fault, but that would be a liability upon the fault, and not

upon the promise. The liability upon the promise would be upon the trust alone. This is a suit upon the promise. It is rightly entitled against the trustees as such. The declaration also is correctly framed in that regard. The proofs in their turn completely negative a personal default.

It is found by the Court that defendants faithfully applied all funds, with fair and reasonable judgment, and that the trust closed largely in debt to them. *Record, folio 57.* The idea of a personal liability is for the first time suggested by the judgment. The judgment is erroneous in that regard.

III. THE FACTS FOUND ARE INCOMPATIBLE WITH JUDGMENT FOR THE PLAINTIFF AGAINST ANYONE. THE COURT ERRED IN RENDERING SUCH A JUDGMENT.

The Court expressly finds that the trust closed in debt to the defendants and that all moneys received were applied by them to what they believed to be "current expenses," in good faith and in the exercise of a fair and reasonable judgment.

The judgment in plaintiff's favor is therefore equivalent to a judicial declaration that expenses, not properly current, were incurred through mistake by the defendants.

This raises a question of law as to what is the meaning of current expenses of said property and trust, as those words were used in the instrument sued on.

The findings disclose the extraordinary meaning which the Court has given to those words:

That about the winter of 1863 and spring of 1864 the defendants, as trustees, erected at a cost of about $35,000, an office for the keeping of the papers and transacting of the business of the trust. That previous to and at the time of the commencement of said building the office of the trustees had been

a small frame building in the centre of the town surrounded by frame buildings. That the sales of the trust property at that time were nearly $200,000 yearly; that in the office was valuable property of the trust, including maps and plats of the city and additions, costing thousands of dollars, the surveys and reports of engineers, title papers of the trust and other property, exposed to destruction by fire, and the building liable to injury or destruction by inundation and by earthquake; that in the opinion and best judgment of the trustees a new substantial fire-proof and earthquake-proof building, and one secure from the water was necessary; that after the commencement of the work the cost of material and building increased; that the trustees deemed the erection of such a building in the place proper and and for the best interests generally of the trust, but the Court is of opinion that said expenditure was not the current expenses of said trust. *Record folio 58, page 37.*

Apparently nothing could more clearly show the error of the judgment. The payments were to be from surplus after certain expenses were paid. Those expenses were necessarily of a contingent nature. The scope of this contingency is a question of the intention of the parties. The words employed must be construed in favor of reasonable rather than an unreasonable intention. It is not reasonable to suppose that the intention of the parties was that the defendants must sit still and see the property or any material part of it destroyed. The law alone would give the right to incur such expense without any stipulation at all. The law confers this right in the presence of apprehended as well as real danger.

"Every trustee is entitled to the necessary and proper expenses incurred in protecting the property committed to his charge. If they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect but probable."

Bright vs. North, 2 Phillips, 216, 220.

The judgment of the Court disregards this view of the law. It disregards as well the plain meaning of the words in the sense in which they are employed. The words are "current expenses of the property and trust."

It has already been pointed out that all of those who used these words were parties to the trust to which they here referred. The scope of that trust has also been found by the Court.

The chain of reasoning is complete which includes in the words above referred to the expenses outlined in the deed. The Court disregards all this and more. It disregards equally the interpretation of the parties with regard to this very transaction. This building was erected in the winter of 1863 and 1864. Plaintiff's testator then, and for years afterwards, was living, and presumably familiar with all the operations of the trust which he himself had held for many years. There is no note of any protest or expostulation from him. No demand made by him or any suit. Nor yet of any explanation given him by the trustees to any one indicating a feeling on their part that such an explanation was required. All parties conduct themselves as if what had been done was precisely what they had all agreed should be done. This conduct of theirs the Court also disregards.

Yet even this is not by itself enough to support the judgment. The record affirmatively shows that the expense of this building did not absorb moneys to the prejudice of plaintiff or her testator. The Court finds that the building was erected in the winter of 1863-4. Another finding (Record, p. 36, fol. 56) discloses that October 1st, 1863, the defendants borrowed for the use of the trust seventy-five thousand

dollars in the shape of a permanent loan. This the Court finds was a "legitimate act by said defend- "ants in the execution of said trust."

Any construction, therefore, of defendants' obligation which will support the judgment must not only ignore the plain reference which they make to the deed of trust, the contemporaneous interpretation of the parties, the obvious duty of the defendants not to make a contract which might arrest the current operations of the trust, and the common law right of an agent or trustee to incur expense needed to meet real or fairly-apprehended danger of destruction to the property in charge. It must go further, even to the extent of holding that so stringent is its operation that defendants could not even borrow money for the preservation of the property, but that any loan must be first to pay plaintiff's testator, then to preserve the property. If a loan could not be had except from parties interested, and for the preservation of the property alone, then the property must go.

This view is as contrary to equity as to the letter of the bond. The equity of plaintiff and of her testator was that moneys which were *in esse* and belonged of right to her or to him should not be applied elsewhere. These moneys were never revenue. They were, as is found by the Court, borrowed legitimately in the execution of the trust, and faithfully applied by the defendants to what they deemed "current expense," and in the exercise of a fair and reasonable judgment therein. No wrong was done by this transaction to plaintiff's testator, or to plaintiff herself. No equitable right arose from it. To charge this transaction to the defendants personally, so far as is required to satisfy the

judgment, is in the last degree inequitable and wrong.

The same reasoning applies *in toto* to the only other fact found which is treated by the Court as furnishing a basis for the judgment. It is found, (*Record, page 37, 12th finding,*) that the defendants on divers days and dates in the years 1863, 1864, 1865, 1866, 1873 and 1874 had in their hands moneys belonging to said trust fund sufficient to pay the amount due the plaintiff after paying therefrom all taxes on the said trust property and the ordinary expenses of said trust, *as appears from the accounts herein contained.*

The accounts herein contained are found in the Record, pages 40 to 36 inclusive. A very brief examination will show plainly the conflict between the finding of these accounts as fact and the conclusion of law that they disclose balances which ought to have been paid to the defendant. The period covered by the finding begins with the year 1863.

Dec. 1, 1862, the defendants, as trustees, borrowed $5,300, which was not repaid until November 1st, 1863. June 1st, 1863, the defendants paid $10,704.34 for taxes. At no time after the loan of December 1, 1862, were the defendants in possession of money enough to meet this forthcoming call for taxes until it was actually paid. Taxes were preferred to plaintiff's claim by the express terms of the agreement. Ought the defendants to have paid plaintiff's testator and risked a default of taxes? The Court finds that defendants acted throughout with strict good faith, and with fair and reasonable judgment. The accounts show that if defendants had paid plaintiff at that time a default would have actually occurred. What more than what they did can be required of them?

From June 1, 1863, down to November 1, 1863, the loan of December 1, 1862, was still unpaid. There is no pretence that payment of this loan was not a current expense. If so, the defendants were right in holding money to provide for it. Indeed, in the face of the fact, of necessity often referred to, that defendants acted throughout reasonably and in good faith, it is hard to see how they are chargeable at any time for holding over a balance afterwards required by current expenses. If there judgment was reasonable, the balance held over must also have been a reasonable balance. October 1st, 1863, before the loan of $5,300 was paid, the trustees, again as expressly found in the legitimate exercise of their duty as trustees, borrowed seventy-five thousand dollars for the uses of the trust. The accounts show that they were never afterwards in possession of funds anywhere near equal to this sum. The situation is the same as with reference to the loan of $5,300, made December 1, 1862, and already discussed. The loan was honestly made to provide means for current expenses. To repay it was therefore strictly a payment of current expenses. Reasonable efforts for its payment by the accumulation of a balance, so long as done in good faith, and not in any sense a willful or unreasonable withholding of moneys from plaintiff's testator or from plaintiff herself could give her no ground of action, and the Court erred in assuming that it did.

Entirely aside from this reasoning, it seems certain that the withholding of these moneys give no right of action under the agreement sued on. The balances in hand, from and after October 1st, 1863, were not, as to any part of them, moneys to which plaintiff had ever any right. They were moneys

which were, in fact, the proceeds of the loan of $75,000, borrowed October 1, 1863, and the loan of $50,000, borrowed October 1, 1867. No finding of the Court impeaches the outlay of any of these sums, except $35,000 for the building above referred to. *The balance in hands of the trustees, plus the amount expended on the building above referred to, was always less than the amount previously borrowed and still unpaid, so that neither these balances nor the cost of the building can possibly be said to be moneys rightly belonging to plaintiff's testator or to plaintiff, and paid out to her prejudice by the defendants.*

When the mortgages were foreclosed (Record, p. 36, folio 56), and after the proceeds of sale were applied, there still remained due on the mortgages an unsatisfied balance of $47,572.27, besides $8,338.30, advanced by the defendants personally and lost to them.

It cannot therefore be said even that the erection of the building ultimately resulted in a loss to plaintiff's testator or herself. The building was erected with borrowed money. This money was not ultimately recouped from the proceeds of the sale, but was lost forever by the lender. The lender and the plaintiff cannot both have lost it, therefore the plaintiff did not.

It may perhaps be urged that it is not fair to claim the loss incurred by the lender as an effect peculiarly against the cost of the building, rather than against the remaining expenditures, which the Court allowed as current. The answer is ready and conclusive. Even supposing that the erection of the building did not increase the amount realized on foreclosure, *it is still certainly true that the ut-*

most difference that could have resulted from omitting to erect the building would have been that the assets of the trust would have been $35,000 more. This additional sum would all have gone to satisfy the mortgages and more, had more been present.

Hence it was both erroneous in law and intrinsically wrong to treat this expenditure as one of which plaintiff was entitled to complain. Much less was plaintiff entitled to complain of it eleven years after it was made.

IV. THE FINDING OF A SUBSEQUENT INDEMNITY IS ERRONEOUS, BECAUSE UNSUPPORTED BY THE PLEADINGS, IRRELEVANT AND MISLEADING.

One finding (*11th Record, page 37, folio 59*) is made by the Court, which is not referred to in the statement of the case, because it has no proper connection with the case.

The substance of the declaration is wholly comprised within three averments:

1. Execution of the instruments sued on.
2. Receipt of surplus above "current expenses."
3. Failure to pay plaintiff's claim.

Of these the only one denied was the receipt of a surplus above "current expenses," as alleged. This was the only issue which, at the trial, was before the Court.

Incidentally to the question of a surplus it was found by the Court that the trust estate had been sold under foreclosure. Also that the trust estate was still indebted to defendants.

These had a direct bearing on the issue, the existence of a surplus.

If it had been further shown that at the time of the commencement of the suit there was still in de-

fendant's hands some property belonging to the trust, then in a suit properly framed the plaintiff's debt might have been charged on that.

It is even possible the defendants might have been charged personally if, at the commencement of the suit, they had in hand property belonging to the trust, and afterwards put it beyond the plaintiff's reach.

It is not easy to see, however, how either of these could have been done, except by a suit in Equity, for several obvious reasons.

The Court goes beyond this and finds that after the suit was begun, and by some means not found by the Court, defendants retained in their hands "under advice of counsel" sufficient funds belonging to the old trust "to protect them against the "possibility of a personal judgment." Said money came into their hands after the commencement of this suit.

Nothing could better illustrate what was said by this Court in *Watkins vs. Holman* (*supra*), that:

> "Equitable and legal jurisprudence have been "wisely separated, and the soundest maxims of "jurisprudence require that each be examined in "its appropriate sphere."

It is here gravely brought forward in behalf of a judgment not invoked by the complaint that since the commencement of this suit, the defendants have taken steps to protect themselves in that event. The steps taken also are carefully found by the Court. The defendants "have retained funds belonging to the old trust." The same findings disclosed that the trust was foreclosed, and a very large balance remained due on the mortgage. Doubtless the mortgage creditor has long since made claim

elsewhere to this same "retained" fund. The defendants also are shewn by the findings in this case to hold against the trust an unsatisfied debt of a considerable amount. Doubtless from the scope of the operations there were other debts unpaid, perhaps for current expenses; and so to be preferred to plaintiff's claim.

In the face of all these equities the Court proceeded to render a personal judgment against the defendants, apparently upon the ground that as they were indemnified, it could do them no personal harm. Upon no other ground could this finding have borne in the mind of the Court the slightest relation to the judgment.

Nothing could more plainly illustrate the necessarily distinct functions of a Court of Equity. In that Court all points, all rights, all matters of account and the whole subject matter of the trust are within easy reach of one complete adjustment. For aught that appears, a new suit, is still within their reach.

Nothing, in turn, could more clearly illustrate the erroneous nature of the judgment here appealed from.

WAGER SWAYNE,
Of Counsel for Plaintiffs in Error.

110-330

SUPREME COURT U.S.
FILED
JAN 22 1884
Clerk.

United States Supreme Court.

October Term, 1883.—No. 222.

S. STAATS TAYLOR AND EDWIN PARSONS, TRUSTEES OF THE CAIRO CITY PROPERTY, PLAINTIFFS IN ERROR,

vs.

MARY N. MAYO, ADMINISTRATOR, DEVISEE, AND LEGATEE OF CHARLES DAVIS, DECEASED.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

ARGUMENT FOR DEFENDANT IN ERROR IN REPLY TO BRIEF FOR PLAINTIFFS IN ERROR.

Owing to the delay on the part of the plaintiffs in error in filing their brief we have had the opportunity of examining the assignments of error only within the last few hours, and have time to print only a very short reply to the argument on their behalf.

I.

FIRST ASSIGNMENT OF ERROR.

The question presented by this assignment of error was raised by these parties on demurrer to the declaration. (Rec., p. 14.) That demurrer was overruled by the Court below, (Ib., p. 19;) and instead of standing by it they

pleaded over to the declaration, (Ib., pp. 39, 19;) and it would clearly seem, therefore, that the question discussed is not open upon this writ of error. (Aurora *v.* West, 7 Wall., 105; Young *v.* Martin, 8 Wall., 357; R. R. Co. *v.* Harris, 12 Wall., 84; Stanton *v.* Embrey, 93 U. S., 553.)

But the theory of the plaintiffs in error that a court of law has no jurisdiction of the subject-matter of this action is manifestly unsound.

We admit that courts of equity, as part of their original jurisdiction, possess the power to compel the proper execution of trusts, but it is equally true—

1st. That trustees possess both legal and equitable powers, and that legal powers operate upon the legal estate, and are cognizable in courts of law, (Perry on Trusts, sec. 488;) and—

2nd. That trusts, though in general of a peculiar and exclusive jurisdiction in equity, are sometimes cognizable at law; *e. g.*, cases of bailments, and that large class of cases where the action for money had and received for another's use is maintained *ex aequo et bono.* (1 Story's Equity Jurisprudence, sec. 60.)

By reference to the instrument sued on and set out in full in the declaration, it will be observed that the undertaking of the defendants was subsequent to the time they assumed the duties of trustees, and that the plaintiff does not set up any claim by reason of being a *cestui que trust*, or by reason of the defendants having in any manner undertaken or had cast upon them the execution of any trust, express or implied, for her benefit.

She simply seeks to recover a stipulated sum, audited and agreed upon, and which the defendants expressly promised to pay out of any moneys which might come to and remain in their hands, after paying taxes and current expenses.

The defendants are not, in any sense, trustees for the plaintiff.

Their failure to pay this debt, if they had the funds with which to do so, was a breach of the contract, and we need not and cannot look beyond the contract itself.

It is not a breach of the trust we complain of. We are in no condition to raise any question of this sort.

The plaintiff stands in no relation to the trustees justifying such an issue.

The act of the trustees in making the contract sued on was an exercise of a legal power by them possessed. It operates upon the legal estate and is cognizable in a court of law.

Under this contract the plaintiff can maintain an action for money had and received, thus bringing the case within both the rules before laid down.

There are no other persons upon the same footing with her; hence there are no equities to be adjusted; and there is no occasion, therefore, for the interposition of a chancellor.

The plaintiff below did not seek to enforce any lien existing upon the trust estate; nor did she seek any relief peculiarly within the jurisdiction of a court of chancery.

Her remedy was plainly, only, in a court of law.

II.

Second Assignment of Error.

The plaintiffs in error are unquestionably personally liable upon the contract sued upon in this case.

Professor Parsons states the principle of this liability very clearly thus:

"The *legal estate* is in the trustee, and the equitable estate

is in the *cestui que trust*; but as the trustee *holds the estate*, although only with the power and for the purpose of managing it, he is *bound personally by the contracts he makes as trustee, although designating himself as such*. The mere use by the promisor of the name of trustee, or any other name of office or employment, will not discharge him. Some one must be bound by the contract, and if he does not bind some other he binds *himself*, and the official name is then regarded only as describing and designating him."

1 Parsons on Contracts, 122.

The authorities fully support this statement of the law. (Childs *v.* Monins, 2 Br. & B., 460; Eaton *v.* Bell, 5 B. & Ald., 34; Rew *v.* Pettet, 1 A. & E., 196; Ex-parte Buckley, 14. M & W., 469; Lennard *v.* Robinson, 5 E. & B., 125; Fulham *v.* West Brookfield, 9 Allen, 1; Packard *v.* Nye, 2 Metcalf, 51.)

For the purposes of a court of law the plaintiffs in error were and are to be deemed the actual and absolute owners of the property, and a reference to them as trustees is to be treated as a reference to them as the owners of the estate.

III.

The Third and Fourth Assignments of Error.

It is not perceived that there is anything in the observations of the learned counsel for plaintiffs in error in support of these assignments of error, which is not sufficiently and satisfactorily answered in our opening brief.

If plaintiffs in error failed to apply the trust funds to the payment of Mrs. Mayo, according to the contract, they are personally liable.

That they did so fail has been found by the court below in the special findings, as we have already shown; and that would seem to make an end of the controversy.

J. Hubley Ashton,
Of Counsel for Defendant in Error.

110-330

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM 1883.

NO. 222.

S. STAATS TAYLOR & EDWIN PARSONS, Trustees of Cairo City Property.
Plaintiffs in Error.
VS.
MARY N. MAYO, Administratrix, Devisee and Legatee of CHARLES DAVIS, Deceased.
Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Brief on Behalf of the Defendant in Error.

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Brief on Behalf of the Defendant in Error.

The declaration in this case alleges, that the defendants, on the 4th day of October, 1861, executed and delivered to Charles Davis, then in full life, but since deceased, their contract in the words and figures following:

"Whereas Charles Davis, late one of the Trustees of the Cairo City Property, has agreed to transfer to the present Trustees of said Property, S. Staats Taylor and Edwin Parsons, at their request, all of said property remaining in his hands, without requiring previous payment of his demands against said Property; now, in consideration of the premises and of one dollar to us in hand paid, we, S. Staats Taylor and Edwin Parsons, Trustees of the Cairo City Property, hereby promise and agree to and with said Charles Davis, his executors, administrators or assigns, that we will apply, from time to time, to the payment of all the just claims and demands of said Charles Davis against said Cairo City Property, (including the sum of 7382 60-100 dollars, audited October 1st, 1860,) until the same shall be fully paid, all the moneys which shall come and remain in our hands, as Trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and Trust, actually imposed or incurred. But said claims and demands of said Davis, his executors or administrators, shall not be preferred to like claims of his late Co-trustee John H. Wright.

S. STAATS TAYLOR,

October 4th, 1861. EDWIN PARSONS,

Trustees of the Cairo City Property."

That at the execution and delivery of said contract, there was due to the said Charles Davis of just claims and demands against the said Cairo Property Company, a large sum of money, to-wit, the sum of 7382 60-100 dollars audited as aforesaid; and a large sum, to-wit, ten thousand dollars not audited. By means whereof the defendants became liable, and promised the said Charles Davis, then in full life, to pay him the said sums of money, according to the tenor and effect of the said contract.

That on the 1st of March, 1867, the said Charles Davis departed this life, after having made, published and declared his last will and testament, which was afterwards duly proven and recorded, whereby the said Charles Davis did give, devise and bequeath all his estate, real and personal, of every kind, to the plaintiff.

That afterwards and on the 30th of September, 1867, the defendants, in consideration of the premises, executed, and delivered to her the following contract in writing.

New York, September 30th, 1867.

"In consideration of one dollar to us in hand well and truly paid by Mary N. Davis, of said New York, administratrix of the estate of Charles Davis, deceased, and of sundry other considerations to us moving from said Mary N. Davis, it is hereby covenanted and agreed between us and said Mary N. Davis, that the agreement made between the undersigned, and said Charles Davis, dated October 4, 1861, relative to the payment by us as Trustees of the Cairo City Property, of the claims and demands of said Charles Davis against said Cairo City Property, is hereby renewed and confirmed, and we do hereby promise and agree, to and with said Mary N. Davis, administrator as aforesaid to pay to her the amounts due to said Charles Davis and his estate, in the same manner and form as in said instrument of October 4, 1861, is particularly set forth.

Dated Sept. 30, 1867.

S. STAATS TAYLOR, [*Seal.*]
EDWIN PARSONS, [*Seal.*]
Trustees of Cairo City Property."

That at the date and delivery of said contract, there was due from the defendants of just claims and demands

theretofore of Charles Davis, against the Cairo City Property, a large sum of money, to-wit, 7382 60-100 dollars (besides interest) audited as aforesaid; and a large sum, to-wit, ten thousand dollars not audited. By means whereof the defendants became liable, and in consideration thereof promised the plaintiff to pay her the said several sums of money according to the tenor and effect of the contract with the said Charles Davis.

That the defendants have not from time to time or in any manner whatsoever, applied to the payment of said sums so due as aforesaid, all the moneys which have come to their hands as trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and trust, actually imposed or incurred; but on the contrary thereof, although the plaintiff avers, large sums of money, to-wit, two hundred thousand dollars, have come to their hands as trustees, over and above the amounts necessary to pay all taxes and current expenses of said property and trust actually imposed or incurred, the defendants have neglected and refused to pay the said sums or either of them.

By consent a jury was waived, and a trial had before the court. The finding of the court upon the facts is special. No exceptions were taken in the progress of the trial, and the only question for consideration therefor is, as to the sufficiency of the facts found to support the judgment.

Jennisons vs. Leonard 21 Wal. 302.

Insurance company vs. Sea Ibid 158.

I.

There is but one material allegation in plaintiffs declaration, concerning which there can be any serious contention, viz: that the defendants did not, from time to

time, apply to the payment of all the just claims and demands of Charles Davis, against said Cairo City property, until the same should be fully paid, all the moneys which came to their hands as trustees as aforesaid, after first paying therefrom all taxes and current expenses of said property and trust actually imposed or incurred.

If the finding of the facts, is sufficient to sustain this allegation, the judgment should be affirmed.

Independant of other questions, the 8th finding of the Court seems amply sufficient. It is as follows: (Rec, p. 89)

"That about the winter of 1863 and spring of 1864 the defendants, as trustees, erected, at a cost of about $35,000, an office for the keeping of the papers and transacting the business of the trust. That previous to and at the time of commencement of said building the office of the trustees had been a small frame building in the centre of the town, surrounded by frame buildings. That the sales of the trust property at that time were nearly $200,000, yearly; that in the office was valuable property of the trust, including maps and plats of the city and additions, costing thousands of dollars, the surveys and reports of engineers, title papers of the trust and other property exposed to destruction by fire, and the building liable to injury or destruction by inundation and by earthquake; that, in the opinion and best judgment of the trustees, a new, substantial fire-proof and earthquake-proof building, and one secure from the water, was necessary; that after the commencement of the work the cost of material and building increased: that the trustees deemed the erection of such a building in the place proper and for the best interests generally of the trust, but the Court is of the opinion that said expenditure was not the current expenses of said trust."

I do not insist that the finding of the Court as a conclusion of law, that this expenditure was not the cur-

rent expenses of the trust, is binding on the Court, but I do maintain that the conclusion is correct. The money was expended for a new erection. If it was not justified as a part of the current expenses of the trust, it was a misappropriation of the funds by the trustees. They should have applied it to the payment of plaintiff's claim.

The language, "current expenses of the trust actually incurred," as used in the contract, only comprehends such expenses as may be incurred in the general course of business, or by ordinary procedure. The word current in this connection, is synonymous with ordinary, and the expenses designated, are thus distinguished from those termed extraordinary.

The language of the contract is clear, and free from any ambiguity. There would seem to be no difficulty in arriving at the intention of the parties to it. Viewing it, however, in the light of the circumstances surrounding the parties at the time it was entered into, adds force to the position assumed. Charles Davis had a lien on the property. This he relinquished, not to indefinitely postpone the time of payment of the amount due him, but with the reasonable expectation that he would soon be paid. This is the rational view. The defendants were not in funds with which to pay Davis. They desired the legal title to pass from Davis to them, therefore the clause with respect to payment, after first paying taxes and current expenses was for the benefit of Taylor and Parsons, and according to the rule must be most strictly construed against them. They selected the language, and the presumption is, that they used these terms in their general signification, and in the sense usually understood.

The 11th finding is as follows: (Ans, f. 37.)

"That after the sale of the trust estate, under the

foreclosure proceeding aforesaid, a new trust was declared respecting the same property, and the said defendants became the trustees, the stockholders being a portion of the old stockholders who paid up their assessments; and the said defendants, after the commencement of this suit, by advice of counsel, retained in their possession sufficient funds belonging to the old trust to pay the amount of plaintiffs claim, so as to protect them from the possibility of a personal judgment. That said money came into their hands after the commencement of this suit."

On this state of facts a recovery could be had, for money had and received. The funds with which to pay plaintiffs demand are in defendants hands. In equity and good conscience they ought to pay it.

The 12th finding is as follows: (Rec, p. 37)

"That the defendants, on divers days and dates in the years 1863, 1864, 1865, 1866, 1873 and 1874 had in their hands moneys belonging to said trust fund sufficient to pay the amount due the plaintiff, after paying therefrom all taxes on the said trust property, and the ordinary expenses of said trust as appears from the accounts herein contained, and that the plaintiff, on divers occasions prior to the bringing of this suit and prior to January 1, 1868 demanded of the defendants payment of the amount due on said contract, which was not paid."

Here is a direct finding, as a fact, that the defendants had in their hands sufficient money to pay the amount due the plaintiff after paying all taxes and ordinary expenses. It is true, reference is made to certain accounts, and if the Court will look at them, it will appear that the year 1863 closed with a balance of $14,770.07 in the hands of the trustees. There was a balance in their hands each month during that year. In 1864 the Janu- Rec,

any balance in their hands was $18,463.89; February $20,576.58; March, $21,742.81; April, $24,070.33. A large balance remained in their hands each month of the year 1864. The account shows that the receipts for that year were $192,236.49, and expenditures $130,610.67, of which $17,039.40 was taxes, thus showing a net balance for the year in the hands of the trustees of nearly $60,000, and this too, while they were erecting the costly so called earthquake-proof building for which they paid about $35,000. The monthly balances in the hands of the trustees from January, 1865, to June, 1867 were large, reaching upwards of $32,000, at one time. In 1865 the expenditures reached the enormous amount of $213,217.54, and in 1866 $163,981.14. From July, 1867, to December, 1872, the trustees seem to have had no balance in hand, but from January, 1873, to April, 1874, they continuously had a respectable amount of money in hand, reaching at one time upwards of $15,000.

(Tran. f. 29)

It may be asked how these large amounts of money were expended. By reference to the 5th finding it appears that the defendants, after delivering the contract in suit to Davis, expended in building Mississippi levee $149,975.23, and on protection of the Mississippi river bank $70,455.06. These expenditures were all extraordinary, and in no sense the current expenses contemplated by the contract with Davis.

The 17th finding of the Court is, I maintain, fully warranted by the accounts also a part of the certificate of facts.

II.

A declaration of trust is set out in the certificate, respecting the property conveyed by Davis to Taylor and Parsons, and it was contended below, and doubtless will be here, that the expenditures of the trustees were au-

thorized by this instrument and therefore they were current expenses within the meaning of the contract with Davis.

It is not for me to deny the authority of the trustees in this regard, but I most earnestly protest against the soundness of the conclusion.

The declaration of trust provides as follows: (Acc. p. 26,)

"Fourth. The said Taylor and Davis and their successors shall have the general management and control of all the property aforesaid, and of the proceeds thereof, pay the taxes thereon when in funds, and all the expenses incident to the creation and execution of the trust hereby declared. They may make such contracts, execute such instruments and obligations, employ such agents and laborers, make such erections and improvements on said lands, and such purchases and sales of real and personal estate, leases, donations and investments as may be necessary and expedient to promote the interests of the shareholders."

This same instrument provides, that the beneficial interest in the lands and premises described therein, shall be divided into thirty-five thousand shares. This instrument operates upon the trustees and shareholders, only. If this was a controversy between them, this instrument would be useful and necessary in determining their respective rights and duties, but what possible aid can it be in the investigation of the legal rights of one to whom these trustees sustained no fiduciary relation whatever. Under this instrument the duty is imposed upon the trustees to keep down taxes, and pay all the expenses incident to the creation and execution of the trust thereby declared. These are manifestly the current or ordinary expenses. A discretion is